85-1887

Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DR. GERALDINE FENNELL,

on behalf of herself and all others similarly situated,
PETITIONER,

v.

WARNER LAMBERT COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED FOR REVIEW

Is it lawful to deprive a person of the right to have a claim heard on its merits where:

. Delay in proceeding was devoted to mending the communicative link between lawyer and client that representational litigation requires and presupposes;

. Delay occurred at a point in discovery where agreement between the parties left the next step in defendant's hands, and where plaintiff's next step was moving to compel answers to its interrogatories;

and where:

. Plaintiff's numerous appeals to the court for help and guidance are on record;

. Plaintiff reasonably believed that the court knew such a breakdown had occurred and was facilitating and participating in plaintiff's efforts to mend it;

where subsequent proceedings clarified that:

. The court had not known the "true nature" of the problem and, instead, had held another,

prejudicial, view of the reason for delay, implanted by defendant;

. Because of miscommunication between two district judges, plaintiff had been denied help the court had intended her to receive;

where:

No ruling has yet explicitly addressed the question of what would be regarded as an appropriate range of response for courts and litigants in the circumstances of this case;

and where the implications of an affirmative answer include sending a message to litigants:

. It matters not if a communicative breakdown occurs such that the actions your lawyer takes in your name are no longer your actions. All that matters is to "make progress one way or another."

. It matters not, in proceeding in the face of such a breakdown, that you affirm the presence of a state of affairs that is absent;

and to lawyers and litigants:

. Lawyers are not required to tell clients why they want/move to withdraw as counsel.

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It is an error of law to construe as "obstructing progress" my efforts to remove an impediment to proceeding and, in light of the district court's finding that my attorney had not apprised me of the "possible drastic consequences of the Rule 16 notice," to say that I "knew that dismissal could occur."	
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The petitioner, Geraldine Fennell, asks that a writ of certiorari issue to review the decision of the US Court of Appeals for the Second Circuit entered on January 17, 1986.

OPINION BELOW

On January 17, 1986, the circuit court entered its decision affirming the denial of my motion for relief from judgment. (Appendix A)

By order dated February 24, 1986, it denied

my motion for extension of time to file a petition for rehearing and then returned to me as untimely my petition for rehearing with in banc suggestion. (Appendix B)

By order dated May 7, 1986, it denied my motion for review of the action of one judge, requesting reconsidering of my motion for extension of time. (Appendix B)

US SUPREME COURT ORDER RE: TIME FOR FILING

On March 31, 1986, this court granted in part my motion (A-745) for more time to file a petition for writ of certiorari, extending the time by 29 days through May 16. (Appendix C)

JURISDICTION

Under 28 USC 1254 (1), I invoke the Court's jurisdiction. There is no other petitioner.

CONSTITUTIONAL PROVISION INVOLVED

US Constitution, Amendment I:

> Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.

US Constitution, Amendment V:

> Nor shall any person . . . be deprived of life, liberty, or property, without due process of law.

EXHIBIT 1 OVERVIEW: PROCEDURAL HISTORY

DATE	COURT	ACTION	APPENDIX
1983			
May	D	M/DISMISS GRANTED	F
June	C	N/APPEAL FILED (83-7473)	
Nov	C	DISMISSAL AFF'D	E
1984			
March	C	P/REHEARING, in banc DEN'D	E
May	D	M/RELIEF from JUDGMENT FILED	
June	S	P/for CERTIORARI FILED (83-2063)	
July	D	HEARING on M/RELIEF from JUDGMENT	
Oct	S	P/for CERTIORARI DEN'D	
1985			
March	D	RULING DENYING RELIEF from JGMT	D
	D	M/RECONSIDERATION FILED	
April	C	N/APPEAL FILED (85-7729)	
	D	M/AN EVIDENTIARY HEARING FILED	
May	D	RULING DENYING M/RECONSIDERATION & M/AN EVIDENTIARY HEARING	D
June	D	M/CLARIFIC'N & RECONSID'N FILED	
Sep	D	MOTIONS DENIED, by endorsement	D
1986			
Jan	C	DENIAL of RELIEF from JGMT AFF'D	A
Feb	C	M/TIME to FILE P/REHEARING DEN'D	B
March	C	P/REHEARING RETURNED AS UNTIMELY	
May	S	M/TIME to FILE P/CERT GRANT'D/PART	
	C	M/REVIEW ACTION ONE JUDGE DEN'D	B
	S	P/CERTIORARI FILED	

STATEMENT OF THE CASE

To simplify the presentation for this petition, I shall focus here on points that are relevant to what may be the determining issue for the circuit court:

> Even if we were to conclude that the district court incorrectly determined that a stipulation existed, such error could not support granting a rule 60 motion inasmuch as appellant continued to obstruct progress in the course of this litigation, even after she knew dismissal could occur. (Appendix C-4)

Procedural history since J. Burns granted Warner Lambert's motion to dismiss, outlined in Exhibit 1, represents a number of different things. Most immediately, it speaks to my wanting to prosecute my complaint against Warner Lambert -- to have my case heard on its merits and thus use the orderly means society provides for resolving grievances. On closer inspection, it shows that I have tried to have the wrongful dismissal of my case corrected in the lower courts -- see my multiple motions for reconsideration in the district court, my requests to this court for more time in which

to file a petition for certiorari so that the circuit could complete its review of my case, and my repeated requests to the circuit court to file my petition for rehearing. Still closer inspection -- of the papers themselves -- shows that the procedural history is the record of my sustained attempt, as yet unsuccessful, to understand how it could be that the courts consider it proper to take away my right to use the legal system to resolve my grievance against Warner Lambert.

In trying to understand, I have learned about errors and misperceptions, fostered by Warner Lambert, that led to the courts' going beyond the record to form conclusions prejudicial to me. In addition, proceedings on my motion for relief from judgment uncovered lapses from good practice in the earlier proceedings and have placed new facts in the record: 1. The original, 1983, decision to grant the motion to dismiss and the circuit court's 1983 affirmation were grounded in the mistaken belief, cultivated by Warner Lambert, that my

lawyer and I had disagreed on the subject of additional documentary production;

2. In originally granting the motion to dismiss, the district court failed to take cognizance of facts plainly in the record with regard to my lawyer's conduct;

3. Due to miscommunication between two district judges, I was denied assistance that J. Burns intended to provide.

That such important facts should not have been available to me at the time of my first appeal means that I was deprived of information essential to effectively arguing for the restoration of my case. The recent proceedings have given me some useful information but I still do not understand why my case remains dismissed. I am distressed by the fact that no ruling has addressed the circumstances that I faced and stated what conduct different from mine would have been regarded as appropriate.

The circumstances that arose in my case may be unusual in a number of respects. It may well be that, within the legal system, there

exists no ready answer to the predicament in which I found myself. But, if that is so, then it is unjust to take away my right to use the legal system in circumstances that not only were strange and troubling to me,but for which the system itself may have been unprepared.

Under Title VII of the Civil Rights Act of 1964, 42 USC 2000e et seq., I filed my complaint against Warner Lambert in federal district court in June 1977, alleging sex discrimination in employment and retaliation. In May 1983, Judge Burns granted Warner Lambert's motion to dismiss for failure to prosecute.

For two main reasons, I was taken totally by surprise when J. Burns granted defendant's motion. I was unaware that Warner Lambert had any cause for complaint against plaintiff -- to the contrary, while we had taken care of Warner Lambert's discovery requests, they had objected to each and every one of our interrogatories and failed to renotice my deposition when my attorney twice raised the subject. So far as we were concerned, our next step would

be to move to compel answers to our interrogatories but the lawyers had agreed to permit Warner Lambert to depose me before Warner Lambert would respond to our interrogatories.

Secondly, I believed that J. Burns was aware that I had encountered a difficulty with my lawyer that was affecting my ability to proceed. Specifically, in a conversation with J. Burns' office months before my case was dismissed, the clerk had indicated that J. Burns would be returning to the matter of my lawyer's conduct, but wanted first to hold a status conference on my case. The background to the conversation was a series of motions to withdraw as counsel made by my lawyer, Mr. Cochran, and a series of written communications from me to the court asking for: 1. Help in having Mr. Cochran tell me why he was moving to withdraw and, 2. Guidance on other ways to handle the situation (see Exhibit 2).

In telling me he wanted to withdraw, Mr. Cochran said: It is clear to me that you do not trust me. Although I asked him to, he

Exhibit 2 REQUESTS TO COURT FOR HELP/GUIDANCE

DATE	PARAPHRASE OF MESSAGE, IN PART
1980	
June	Memo, opposing motion to withdraw as counsel (A 81). "My atty says only: 'It is clear to me you do not trust me.' Will not say what words/actions signify 'distrust' to him."
Oct	Comments at hearing on m/withdraw (A 86). "No substantive dispute; my atty won't say what the problem is."
	Letter written at J. Burns'invitation (A 92-3). "Lack of information is impairing my ability to proceed. Help me get information."
1981	
June	Letter to J. Burns (A 97). "Revive 2nd m/withdraw & assign to another judge to provide nonprejudicial forum in which my atty will feel free to talk. Please suggest other ways to deal with situation."
Nov	Letter to J. Burns (A 99). "Revive 2nd motion to withdraw. Can't solve problem myself. Am in a very bad position about continuing case or hiring new atty."
1982	
Jan	Letter to Clerk (A 105). "Have just heard that defendant is asking Magistrate to dismiss my case. Please don't. Need time to resolve representational problem. Tell me what information you need from me."
March	Spoken to J. Zampano at pretrial conference: "Help me understand atty's reasons for moving to withdraw. Where can I turn for help?." J. Zampano declined, saying assignment was only to pursue settlement (A 241, 280).
Nov	Spoken to J. Burns' clerk: "J. Zampano saw his assignment only as pursuing settlement. I still need help I've been asking for" (A 208).

"A" refers to page in Appellee's Appendix.

never told me what words or actions of mine meant "distrust" to him. Directly with Mr. Cochran I tried to mend this breakdown in communication myself and, from everyone I could think to turn to, including the court, I asked for help in mending it and in identifying other ways of handling the situation.

Before she dismissed my case, I had some reason to believe, and did believe, that J. Burns was sympathetic to the fact that Mr. Cochran's conduct was causing me difficulty in proceeding. In my letters and at the hearing on a motion to withdraw as counsel, I had told J. Burns of my difficulty, and her actions seemed to indicate she sympathised: 1. She denied the motion to withdraw as counsel, which I had opposed; 2. Later, when Mr. Cochran persisted in not telling me why he wanted to withdraw, J. Burns granted my request that she revive a dormant motion to withdraw and assign it to another judge in the hope that Mr. Cochran would feel able to talk freely before a judge, not otherwise involved in the

case; 3. When that came to nothing because Mr. Cochran did not react to the briefing schedule J. Burns seemed to respond further to my predicament by scheduling a pretrial conference under J. Zampano's aegis at which I could ask for his help in obtaining clarification from Mr. Cochran; 4. When I reported to J. Burns' clerk that the meeting turned out not to be helpful because J. Zampano told me that his assignment was only to explore settlement, I believed that J. Burns intended to return in due course to the matter of Mr. Cochran's unreasonable conduct.

J. Burns' ruling dismissing my case left me in the dark as to why she had granted Warner Lambert's motion. As a layperson, when I read the ruling I did not understand the procedural points -- about discovery and (local) Rule 16 -- and I was puzzled and dismayed by J. Burns' omitting any reference to my appeals for her help in connection with Mr. Cochran's conduct.

At this time I was also looking into appealing J. Burns' decision, including trying to

understand the legal issues, to locate and discuss an appeal with lawyers, and explore the implications of representing myself. As the deadline for filing a notice of appeal drew near, these issues were unresolved and I filed the notice pro se. The idea that I could even attempt to undertake representing myself entered as an option when a lawyer told me that the librarian at a nearby law school would introduce me to the material I would need to use. Until then, the thought had not crossed my mind that I could even begin to make sense of the contents of law books.

By the time I had finished preparing my principal brief, I believed I had indentified the errors of law that J. Burns had made. Considering the three provisions of Rule 41b, it was clear that Warner Lambert had no ground for moving to dismiss. We had not failed to prosecute, we had not disobeyed an order, or failed to "comply with these rules." In one commentary on Rule 41b, I read that "sparse docket entries," which had occurred for a time

in my case, could be a factor. On the other hand, in regard to the extreme step of taking away one's right to a trial on the merits, judicial opinion strongly requires district courts to consider all the circumstances, and to look to reasons for delay. Accordingly, I believed J. Burns had erred in failing to take account of what she knew about the problem that led to my inability to proceed.

The unreliability of Warner Lambert's papers has been a troubling disruption. Difference of opinion on facts and interpretations, I expected; but not brazen misrepresentation of my argument, and of cases, record, and rules, which I have pointed out and documented in appellant's reply briefs.

I was crushed by J. Kaufman's Detailed Order. Warner Lambert's untruths had been successful and were reflected in the Order.

Carefully reading the Detailed Order, I was sure the points I could bring forward in petitioning for rehearing with in banc suggestion would be compelling. They were not.

I wrote a petition for certiorari but I had lost any thread of understanding of my case. Accepting at face value that my arguments had been unsuccessful, I concluded that I was failing to grasp the issues, but I was unable to identify analytically what had gone wrong.

Simply stated, I still did not know why J. Burns had granted Warner Lambert's motion. Reading her ruling once more and now with a little more understanding, I could see how some of her misstatements of fact might be significant. Along the way, I had learned of Rule 60(b) motions and, to comply with the Rule's one-year limit, I put aside my petition for certiorari and moved for relief from judgment on ground of judicial mistake of fact.

As the failure of my appeal sank in, another idea came forward in my mind. The courts were telling me that it was proper to dismiss my case i.e., proper to take from me my right to have my complaint against Warner Lambert heard on its merits. If so, what had I done to lose that right? What should -- or could

-- I have done differently to avoid losing that right? At the time, I had felt paralysed by Mr. Cochran's conduct, and could only ask for guidance and help, as I had done in various communications to J. Burns. Now, after the fact, I did not know what else I could have done. So, in a memorandum supplementing my 60(b) motion, I asked J. Burns to tell me what I should have done differently as plaintiff and personally.

In connection with my motion for relief from judgment, J. Burns made three decisions and issued two rulings. Errors in her first ruling (March 1985) finally provided some answers to what had gone wrong. As her second ruling (May 1985) confirms, J. Burns had gone beyond the record to form erroneous conclusions, which were undetectable, I think, in her original, 1983, ruling. In a few respects, J. Burns had misapprehended the problem that Mr. Cochran's conduct was causing: Whereas I had believed that she understood that his failure to tell me why he wanted to withdraw had

paralysed me with regard to proceeding pending clarification, she now stated she was "not privy" to the problem's "true nature." Somehow, she had failed to take cognizance of the fact that I had repeatedly asked for her help in obtaining information from Mr. Cochran and for her guidance on other ways to handle the situation. In her first, March 1985, ruling she now said that I should have known to "make progress one way or another," and that she had granted the motion because she felt all her efforts to "move the case" had been fruitless. It is clear too that J. Burns failed to appreciate that while my case was still alive, I took it for granted that she knew what I had written to her about my difficulty and that, when the court denied the motions to withdraw as counsel and, at my request, revived a dormant motion to withdraw and then set up a meeting under J. Zampano's aegis, it had seemed to me as though she was participating in and facilitating my effort to gain the understanding of Mr. Cochran's conduct I needed in

order to proceed. I saw her actions in the context of what I had written to her, and I had no inkling at all that she was other than sympathetic to my plight. Her March, 1985 ruling also revealed that there had been a major misunderstanding between herself and J. Zampano. Whereas her original, 1983, ruling had referred to the Zampano conference as a "settlement" conference, this new ruling of March 1985 confirmed that she had intended J. Zampano to be helpful in regard to the problem Mr. Cochran's conduct was causing. So, it had now become clear that, in declining to respond to my asking him to help, J. Zampano had not provided assistance that J. Burns had intended him to offer. Moreover, and most troubling, J. Burns' new ruling indicated that she had accepted an idea planted by Warner Lambert: She believed that Mr. Cochran and I were disagreeing over discovery -- specifically, that he was seeking my authorization to produce more documents and that I was resisting.

In my motions for reconsideration and for

an evidentiary hearing, I addressed such issues. In her second ruling (May 1985), J. Burns again denied relief from judgment and denied my motion for an evidentiary hearing. She stated weak versions of facts on which I had wanted to produce evidence. Even these weak facts are telling with regard to the proper disposition of my case (Exhibit 3), and they provide no grounds for the recent finding of the circuit court:

"Appellant continued to obstruct progress in the course of this litigation even after she knew that dismissal could occur"

In sum, I have gained an understanding of some of what has gone wrong in regard to the courts' handling of my case. Given the errors that have come to light, I am all the more convinced that my case should not have been dismissed and that the motion for relief from judgment should have been granted. I am greatly troubled that misperceptions, as yet undetected, remain to distort the courts' view.

REASONS FOR GRANTING THE WRIT

You will recall that when the circuit court

EXHIBIT 3 SUMMARY: SECOND RULING ON 60E MOTION, MAY 1985

BACKGROUND (A222):

MOVING FOR AN EVIDENTIARY HEARING ON TOPICS THE COURT CONSIDERED RELEVANT, I IDENTIFIED DOMAINS ON WHICH I COULD PRESENT EVIDENCE:

-Alleged disagreement between my lawyer and me regarding document production,
-Nature of the problem of my lawyer's conduct,
-Impact on me of the (local) Rule 16 notice,
-Nature of the Zampano "settlement" conference.

THE RULING (Appendix D-15):

1. DENIED MOTION FOR EVIDENTIARY HEARING

2. ACCEPTED AS TRUE MY REPRESENTATIONS ON THE FOLLOWING (WEAKLY* STATED) ISSUES:

"Plaintiff and her attorney did not disagree on document production;

"Plaintiff has yet to receive a full explanation as to why her attorney wished to withdraw;

"Plaintiff was not fully apprised by her attorney of the possible drastic consequences of the Rule 16 notice;

"The court did not succeed in repairing the breakdown in communication and understanding between Dr. Fennell and Mr. Cochran."

3. STATED THIS CONCLUSION:

"NONE OF THESE FACTS CHANGE THE COURT'S OPINION, HOWEVER, THAT THIS CASE WAS NOT PROSECUTED DILIGENTLY AND THAT THE COURT HAD DISCHARGED ITS OBLIGATION TO ATTEMPT TO SOLVE THE PROBLEM THAT CONTRIBUTED, IF NOT CAUSED IN ITS ENTIRETY, THE CESSATION OF SUBSTANTIVE PROGRESS.."

* Compared to facts I wanted to present.

denied my motion for extension of time, it returned as untimely my petition for rehearing with in banc suggestion. In that petition I addressed each of the points in the Detailed Order but I shall focus here on a summary of what I said in response to the circuit court's dual notion that I was "obstructing progress" and that I "knew that dismissal could occur."

> It is an error of law to construe as "obstructing progress" my efforts to remove an impediment to proceeding and, in light of the district court's finding that my lawyer had not apprised me of the "possible drastic consequences of the Rule 16 notice" to say that I "knew dismissal could occur."

1. "Obstruct Progress." There has been no previous finding that I was obstructing progress. Consider J. Burns' language, which speaks only of the passage of time without progress (e.g., Exhibit 3). Consider my words of November, 1981, asking for the court's help in obtaining information:

> "I am in a very bad position with regard to continuing my case or hiring another

> lawyer ... I am asking the court to help so that we may all return to efforts to resolve my ... suit." (A 99)

As I understand it, to "obstruct" progress, I would have had to oppose the court in some way -- as in disobeying a court order, or resisting some counsel or instruction from the court short of an order. I did nothing like that. Moreover, through a variety of actions, the court left it open for me to infer that it was sympathetic to my predicament and willing to take some steps to help me. Furthermore, by the clerk's not dismissing the case under (local) Rule 16 in January 1982, when the representational problem was the only reason stated for delay (A 95, 105), and by the court's later scheduling a pretrial conference (March 1982) and a status conference (December 1982), it accepted the representational problem as a reason for delay.

2. "Knew Dismissal Could Occur. "The evidence I would have presented on this matter includes the fact that my lawyer did not tell me about his receipt of the Rule 16 notice (i.e., A 94,

95, 96) until after my case was dismissed, and I did not acquire the concept of a clerk-initiated process and sua sponte dismissal for failure to prosecute until still later. My lawyer never explained to me why he treated the (local) Rule 16 notice of proposed dismissal as he did, and I note that he did not request an extension of time to respond (A 95), contrary to Warner Lambert's suggestion (Appellee's Brief, 7).

3. "Appellant Continued to Obstruct Progress in the Course of This Litigation, Even After She Knew Dismissal Could Occur."

So far as I was concerned, before dismissing my action the court had not raised the possibility of dismissal. The choice I faced was between, on the one hand, authorizing someone to act for me in circumstances where I could not regard the actions taken as my actions and, on the other, trying, and seeking help in trying, to remove the condition that caused such an impediment to proceeding, while informing the court and seeking its help. One would totally miss the point, to characterize the

problem, as I lived it, as an intellectualized issue of disagreement, or principle, or conscience, or contest of will between the court and myself. Beyond seeing it as an issue of personal responsibility, I was experiencing an inability to proceed (A 283) for which I had no name, and my circumstance was one for which others seemed to have no ready label. My predicament was all the more distressing and no less compelling for being unfamiliar.

What if I had been confronted with dismissal? Had J. Burns indicated that the courts/law regard Mr. Cochran's statement: "It is clear to me that you do not trust me" as explanation enough, and that I should move ahead or risk dismissal, I believe I would have been somewhat surprised but would have accepted the state of affairs as part of what was involved in using the legal system to resolve disputes.

More recently, I have been able to intellectualize the issue in various ways (e.g., A 229-34). I earnestly hope that liti-

gants would not be pressured to "make progress one way or another" (A 192), in circumstances such as I experienced i.e., if they cannot regard the actions taken in their name as their actions. I look to this court to name and discuss the predicament I confronted and, thus, to help clients who unfortunately meet such a problem -- to ensure that: i) clients have language and concepts to identify and communicate their difficulty, find help and, if necessary, resist pressure from within or without to proceed before the problem is resolved; ii) the legal system promptly identifies that a critical breakdown has occurred and responds less ambiguously and more appropriately than it did in this instance.

However, as I stated in one of my papers in the recent proceedings:

"In none of my conversations with court personnel (before my case was dismissed) did I get the sense that I was being told: If you want to use the legal system to resolve your dispute with defendant, you must accept your lawyer's unexplained withdrawal as counsel." (A 207).

As reflected in the record, the first time

I considered the possibility that the court might in fact deliver such a message was following receipt of its ruling of March 1985 and, in my motion for reconsideration, I asked the court to clarify that point:

"Do I correctly understand that you are saying to me today: Once Mr. Cochran's motion to withdraw was denied ..., you should have forged ahead with your case, even if you felt it wouldn't be your action from that point on?" (A 208 -- see also A 229-232).

The ruling of May 1985 strongly suggests that the court is indeed delivering such a message (Aplt's Brief, 29-32).

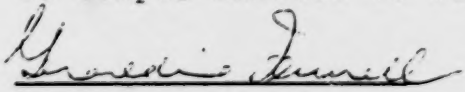
I ask this court: Do you endorse sending a message to litigants to the effect:

"You must accept your lawyer's unexplained withdrawal as counsel or risk dismissal"?

I ask this court: Do you take the position that a court can properly dismiss an action for failure to prosecute where:

A "breakdown in communication and understanding" (Exhibit 3) between plaintiff and lawyer exists, such as occurred here, and plaintiff continued to try to mend the breakdown, and let the court know it had occurred, and asked

for the court's help in solving the problem, and its guidance on other ways to deal with the situation, and where, belatedly (May '85), the court acknowledges its obligation to attempt to solve the problem and that it did not succeed in repairing the breakdown, and where plaintiff argues that the court did not in fact attempt to solve the problem because it failed to cognize the problem's "true nature" and because of miscommunication between Judges Burns and Zampano and, finally, where delay attributable to the representational problem arose at a point in discovery at which, because of agreement between opposing counsel to permit Warner Lambert to depose me before they would respond to our interrogatories, the next step was in defendant's hands i.e., to renotice my deposition, and plaintiff's next step, thereafter, was to move to compel answers to our interrogatories?



GERALDINE FENNELL, Pro se

May 13, 1986

APPENDIX

C O N T E N T S

A 1986 DETAILED ORDER OF SECOND CIRCUIT

B ORDER OF SECOND CIRCUIT DENYING MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING

ORDER OF SECOND CIRCUIT DENYING MOTION FOR REVIEW OF ACTION BY ONE JUDGE

C US SUPREME COURT ORDER RE: TIME FOR FILING

D 1985 DECISIONS OF DISTRICT COURT

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1986 DETAILED ORDER OF SECOND CIRCUIT

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a stated Term of the US Court of Appeals for the Second Circuit, held at the US Courthouse in the City of New York, on the 17th day of January, one thousand nine hundred and eighty-six.

Present:
Honorable Richard J. Cardamone,
Honorable George C. Pratt,
Circuit Judges,
Honorable Charles E. Wyzanski, Jr.,
District Judge for the District of Massachusetts, sitting by designation.

DR. GERALDINE FENNELL, on behalf of herself and all others similarly situated,
Plaintiff-Appellant,
-against-
WARNER LAMBERT COMPANY,
Defendant-Appellee.

ORDER
Docket No
85-7729

Geraldine Fennell, pro se, appeals from a judgment of the US District Court for the District of Connecticut (Burns, J.) denying her motion pursuant to Fed. R. Civ. P. 60(b)(1) for relief from judgment due to judicial mistake, and denying her subsequent motions for reconsideration, an evidentiary hearing, and further clarification and reconsideration.

The present appeal is part of protracted

litigation appellant initiated in June 1977 when she brought a Title VII action against Warner Lambert Company for wrongful discharge. By order dated November 25, 1983 we affirmed the trial court's dismissal under Fed. R. Civ. P. 41(b) of appellant's suit for her failure to prosecute.

On May 4, 1984, Fennell filed a motion pursuant to Fed. R. Civ. P., 60(b)(1) in the district court for relief from judgment claiming mistake of substance in the district court's 1983 ruling on the motion to dismiss, which was denied on March 5, 1985. Fennell subsequently moved for reconsideration and for an evidentiary hearing and later moved for clarification and reconsideration. All of these motions were denied.

Under Red. R. Civ. P. 60(b)(1) a court may relieve a party from a final judgment, order, or proceeding on grounds of mistake, inadvertence, surprise, or excusable neglect. The motion must be filed within a reasonable time or not more than one year after the judgment

or order has been entered of taken. A rule 60(b) motion is within the trial court's discretion, and appellate review is restricted to determining whether the district court abused its discretion. Matter of Emergency Beacon Corp., 666 F 2d 754, 760 (2d Cir. 1981). The basis for Fennell's Rule 60(b)(1) motion and her subsequent motions for reconsideration and clarification are her claims that the district court never realized that Fennell responded in 1977 to Warner's discovery requests, and that the court incorrectly found that the parties entered a stipulation regarding the discovery. The district court's opinion denying appellant's Rule 60(b)(1) motion responded to both these claims. The court stated it knew of Fennell's 1977 response, but that a single response was insufficient considering Fennell's intractable status in the three years following in which the case was pending. As to the stipulation, the court stated that while no official written stipulation existed, correspondence between the parties evidenced an

understanding regarding discovery.

Both of these findings are supported by the record. First, Fennell's 1977 response cannot outweigh the subsequent three years marked by inaction. As noted, we have already ruled that the district court properly evaluated the litigation history of this case. Second, Fennell's disagreement with the district court's findings regarding the existence of the stipulation is an insufficient basis to reverse since the letters arguably evidence the "stipulation" referred to. Even were we to conclude that the district court incorrectly determined that a stipulation existed, such error could not support granting a Rule 60(b)(1) motion inasmuch as appellant continued to obstruct progress in the course of this litigation even after she knew dismissal could occur.

The judgment is affirmed.

N.B. Since this statement does not contitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited, or otherwise used in unrelated cases before this or any other court.

ORDER OF SECOND CIRCUIT DENYING MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING

Endorsed on motion, by crossing out the word "granted." Richard J. Cardamone, Circuit Judge. Stamped: Filed Feb 24 1986.

ORDER OF SECOND CIRCUIT DENYING MOTION FOR REVIEW OF ACTION BY ONE JUDGE

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a stated Term of the US Court of Appeals for the Second Circuit, held at the US Courthouse in the City of New York, on the 7th day of May, one thousand nine hundred and eighty-six.

Present:
Honorable Richard J. Cardamone,
Honorable George C. Pratt,
Circuit Judges,
Honorable Charles E. Wyzanski, Jr.,
District Judge for the District of Massachusetts, sitting by designation.

DR. GERALDINE FENNELL, on behalf of herself and all others similarly situated,
Plaintiff-Appellant,
-against-
WARNER LAMBERT COMPANY,
Defendant-Appellee.

O R D E R
Docket No 85-7729

Geraldine Fennell, pro se, moves for reconsideration of our prior denial of her request for an extension of time to file a petition for rehearing.

It is hereby ordered that the motion be and it hereby is denied.

US SUPREME COURT ORDER RE: TIME FOR FILING

SUPREME COURT OF THE UNITED STATES

No. A-745

GERALDINE FENNELL, Applicant,

v.

WARNER-LAMBERT COMPANY

ORDER EXTENDING TIME TO RILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of applicant, IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 16, 1986.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 31st day of March, 1986

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DR. GERALDINE FENNELL, :
on behalf of herself and :
others similarly situated :
:
v. : Civil No. N 77-252
:
WARNER-LAMBERT COMPANY :

RULING ON PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

Plaintiff in this action alleging sex discrimination is now appearing pro se. She has moved pursuant to Fed. R. Civ. P. 60(b)(1) for relief from judgment claiming judicial mistake. The action was dismissed on May 6, 1983, for failure to prosecute the case diligently, to conduct discovery, and to explain why dismissal was inappropriate when required to do so by notice of the clerk of the court under Local Rule 16(a). The Second Circuit Court of Appeals affirmed the dismissal on November 25, 1983, and denied plaintiff's petition for rehearing on March 13, 1984.

Defendant has objected to plaintiff's motion for relief from judgment, claiming that

plaintiff's claims of mistake are merely "nit-picking" and that this motion was untimely filed and raises matters that were includable on appeal and thus are not properly before this court. Because plaintiff is a lay person, the court prefers to address the merits, and notes that plaintiff did file the instant motion within one year, albeit just barely, from the entry of judgment. Plaintiff's response to defendant's claim that the instant motion raises matters that were includable in plaintiff's appeal is that only the ruling judge can "answer" whether certain factors were considered or whether they were mistakenly overlooked. Of course, it is the ruling itself that is the objective evidence of what the court considered, but in an effort to help plantiff come to terms with the dismissal of her suit, the ruling dismissing plaintiff's case is reconsidered on its merits.

The court has reviewed the entire file and considered fully plaintiff's claims of judicial mistake in her memoranda of May 4, 1984,

June 19, 1984, and October 31, 1984.[1] Nevertheless, the court persists in the view that dismissal was warranted in this case.

Because the dismissal was based in large part on plaintiff's failure to provide and conduct discovery diligently, plaintiff first asks whether the court was aware that plaintiff answered defendant's Rule 34 document production request in a timely manner on October 4, 1977. (Docket #11). The implication of the question is that, if the court had been aware of plaintiff's response, its conclusion in May, 1983, would not have been to dismiss the action. Plaintiff also questions the court's characterization of defendant's January 22, 1979, letter as requesting "specific documents" (p. 6 of Ruling) and claims there was no stipulation or other agreement that plaintiff's document production would precede all other discovery. (p. 8 of Ruling).

The court was and is aware that plaintiff responded to the document request in 1977, in

that she produced some documents and raised objections to the production of others.Plaintiff also produced additional records in February of 1979 (letter of Frank Cochran, February 12, 1979). However, plaintiff fails to recognize that if her objections to producing other documents were not all valid, eventually plaintiff would be required to make further production. It is of no consequence that defendant Warner-Lambert was requesting production of documents it might already have possessed. Defendant is entitled to discover what plaintiff possessed regarding the relationship between plaintiff and her employer.

Regarding the comment that defendant's letter of January 22, 1979, specified certain documents, there can be no serious dispute that plaintiff's counsel was fairly apprised of what documents defendant wanted from plaintiff. Plaintiff's claim of mistake on this issue is without merit.

Plaintiff is correct that the stipulation filed with the court on November 21, 1978,

refers only to the fact that defendant need not answer plaintiff's interrogatories "until after further application for such compliance." There is no mention in the stipulation of the agreement between counsel that the taking of plaintiff's deposition would await further document production by plaintiff. However, the court finds that the correspondence between counsel does evidence just such an agreement. Although it might have been preferable to memorialize that agreement in the form of a stipulation also, the court and the discovery rules encourage parties to resolve their differences informally short of court intervention whenever possible. The November 15, 1978, letter from then-counsel for defendant, Warren Eginton, is addressed to Frank Cochran and begins "This will confirm our agreement on the following procedures..." and proceeds to delineate a sequence of document production by plaintiff, then the deposing of plaintiff, and finally defendant's answers to plaintiff's interrogatories. Plaintiff now

questions whether a letter from the defendant's counsel can demonstrate that a consensus was reached. Because of the representation, however, that the November fifteenth letter confirmed an agreement, plaintiff's counsel had the affirmative responsibility to respond to the letter and clarify the terms of the agreement if he did not concur in the procedures set forth by defendant's counsel. Certainly Mr. Cochran's own letter of January 19, 1981, affirmatively acknowledges some sort of sequence to discovery, although it does not explicitly acknowledge that document production would be the first step.

Despite plaintiff's initial document production in 1977, defendant was entitled to further production which it never received. Defendant did not formally move to compel that production but instead engaged in continuous attempts to reach an amicable agreement. Defendant did not initiate the dismissal issue; it was raised by the clerk's office Rule 16 Notice of April, 1981. Once raised, defen-

dant was entitled to insist that dismissal under Local Rule 16 was the proper sanction for delay in document production and that it need only move to compel discovery if dismissal was not in order. (Letter of Paul Knag, to Magistrate Latimer, January 28, 1983).

In spite of the discovery sequence agreement reached in 1978, as late as January of 1981,[2] plaintiff's lawyer stated he could not give further documents until he had "instructions from my client regarding that issue." Defendant was told nothing more on the issue until plaintiff's counsel stated at a status conference on December 14, 1982, almost two years later, that he had no authority to, and would not, produce further documents.

From the court's perspective, and that of plaintiff and her attorney, the case was not completely dormant in 1980, 1981 and 1982. However, the activity during that period was almost exclusively directed toward Mr. Cochran's attempts to withdraw as counsel, and plaintiff's objections to his withdrawal.

Plaintiff's counsel filed three such motions to withdraw on December 14, 1978, June 20, 1980, and December 18, 1981, and the court held a hearing on the issue on October 22, 1980. No doubt the prolonged problems between plaintiff and her lawyer contributed to much of the inattention to discovery; indeed, it may have also been one reason why defendant, at first, did not move to compel discovery in the expectation that the representation issue would be speedily resolved and attention could be turned again to discovery. No one expected the representation problems to span almost three years. The fact remains that unless and until a motion to withdraw is granted, counsel has a continuing responsibility to represent his client. On November 25, 1980, the court denied the motion to withdraw, yet there was no further prosecution of the action until January of 1983, when defendant was insisting the court dismiss the action pursuant to Local Rule 16.

The problems between counsel and client

affected discovery initiation and the filing of a proper response to the Rule 16 notice. Plaintiff's response to the Rule 16 notice of imminent dismissal was inadequate. The notice was sent April 29, 1981. On May 21, 1981, Mr. Cochran responded, citing once again the problems between client and counsel, although he acknowledged that his motion to withdraw had been denied. In response to his letter, the court extended plaintiff's time to respond further and resume active litigation of the matter until September 22, 1981. However, nothing further was filed by plaintiff or occurred in the prosecution, and, as cited earlier, the court and the defendant discovered at the December, 1982, conference that plaintiff apparently had not authorized her lawyer to produce further documents. Plaintiff herself suggested in her brief on appeal (pp. 18-19) that she did not permit Mr. Cochran to resume work on the litigation.

> What I knew at the time was that not understanding Mr. Cochran's reason for wanting to withdraw as counsel left me without the

> information I needed to manage my affairs responsibly -- either in choosing new counsel or in prosecuting my case against Warner Lambert ... Freely, to have gone along with Mr. Cochran's withdrawal as counsel on the grounds that I distrusted him or, following Judge Burns' denial of his (first) motion to withdraw, to have allowed him to resume work on my case as though the whole episode had not happened and in the light of his subsequent response to my questions .. or to have released him, left too many questions unanswered. I felt that my actions from then on under any of the three options, would not be the informed actions of a responsible person

Plaintiff's recent memoranda are replete with the question of what she should have done differently to avoid dismissal. The court, however, asks the same question: what more could the court have done to move this action along. The court has an obligation to protect the rights of defendants as well as plaintiffs corporation as well as individual. From the defendant's perspective, although aware of the representation troubles, nothing occurred in this case after 1980. This court held a hearing, referred the plaintiff and her lawyer to the magistrate (November, 1981)[3] and to Judge Zampano (March, 1982) to enable them to talk freely and finally, absent resolution, gave

effect to plaintiff's opposition and denied her lawyer's motion to withdraw. The court was not and still is not privy to the true nature of the problems, nor was it proper for the court, as the ultimate trier of fact, to know those details. Nonetheless, the court was willing and anxious to facilitate the resolution of this delicate dilemma, but in no way sanctioned cessation of substantive progress in the case during the process. Regardless of who "caused" the tension between them, plaintiff and her lawyer were responsible for prompt prosecution of the case. Over two years of disagreements between them does not excuse inattention to the case or failure to fulfill the agreement regarding the sequence of discovery.

As a "plaintiff," Dr. Fennell was responsible for seeing that the lawyer who she insisted continue in her behalf provide the documents due whether or not she personally agreed that defendant was entitled to them. As a "person," the court can only say that plain-

tiff should have recognized how the deteriorated client-counsel relationship impeded the orderly progress of the case. The court granted plaintiff's request to foreclose Mr. Cochran's withdrawal, yet the denials of his motions did nothing to resolve the issue or move the case. The Rule 16 Notice on file since April of 1981 should have alerted Dr. Fennell that there was an urgent need to make progress one way or another.

Although not, perhaps, explicit enough for plaintiff, the court did find defendant's claims of prejudice by delay credible and a factor weighing in favor of dismissal. Surely plaintiff must recognize that if the court found defendant had been prejudiced by delay in May of 1983, the situation was even more difficult in May of 1984, when plaintiff filed this motion, and the obstacle was that much harder for plaintiff to overcome as of that date. (Plaintiff was discharged by defendant over a decade ago.) Nor did a lesser sanction appear appropriate because the court was of

the opinion that all its efforts to move the case had already proved fruitless. Upon review, and having examined in particular the points plaintiff has called to the court's attention, it still appears that dismissal was the only alternative.

Finally, plaintiff requests "guidance" as to the filing of a Rule 60(b)(6) motion, based on her claim that defendant has changed its position regarding the discovery history. The court does not find that defendant has in fact changed its position regarding the agreement that document production would precede other discovery, and, as stated earlier, the court agrees with defendant that such a procedure was reasonable and had, in fact, been agreed upon at a very early stage in the litigation.

Accordingly, plaintiff's motion for relief from judgment due to judicial mistake is denied.

SO ORDERED,
ELLEN BREE BURNS, USDJ

Dated at New Haven, Connecticut, this 5th day of March, 1985.

NOTES

1. In addition, oral argument was held on July 13, 1984, in response to plaintiff's request for same, filed June 4, 1984. Plaintiff's position was that she wished to make herself available to answer any questions the court might have. In fact, plaintiff's most recent memorandum reiterates her offer to "talk" and "explain." The onus is not on the court to ask the magic questions, however, and plaintiff has expressed herself well in her memoranda. The court does not need further information from plaintiff. As explained below, the court does not know the full details of plaintiff's problems with her lawyer even now, but such knowledge is irrelevant. The dismissal was based on the objective facts of an inordinate period of nonactivity during the course of plaintiff's representation problems, and the effect of that delay on the defendant.

2. Discovery proceeded adequately up until 1979. By mutual agreement, discovery was suspended for the period of the pendency of the motion for partial summary judgment, which was decided January 3, 1980. It was from that point on that Mr. Cochran's attempts to withdraw apparently consumed the attention of plaintiff and her lawyer.

3. It is further evidence of the court's inability to make progress that plaintiff did not respond to the magistrate, who denied the motion to withdraw December 21, 1981.

RULING ON PLAINTIFF'S MOTIO FOR EVIDENTIARY HEARING AND FOR RECONSIDERA ION

Plaintiff has moved for an evidentiary hearing to clarify certain factual matters as they relate to plaintiff's pending motion for reconsideration of this court's ruling of March 5, 1985, which was a denial of plaintiff's motion for relief from the court's dismissal of her case on May 6, 1983.

Plaintiff's motions are denied. There is no need for further factfinding. The court accepts as true plaintiff's representations on the following issues: that plaintiff and her attorney did not disagree on the subject of document production; that plaintiff was not fully apprised by her attorney of the possible drastic consequences of the Rule 16 notice; that plaintiff has yet to receive a full explanation as to why her attorney wished to withdraw as her counsel; and that the court did not succeed in repairing the breakdown in communication and understanding between Dr. Fennell and Mr. Cochran. None of these facts

change the court's opinion, however, that this case was not prosecuted diligently and that the court had discharged its obligation to attempt to solve the problem that contributed, if not caused in its entirety, the cessation of substantive progress in the case.

Plaintiff's motions for an evidentiary hearing and for reconsideration are accordingly denied. It is the court's understanding that plaintiff has already filed her notice of appeal and thus her motion for extension of time in which to do so is now moot.

SO ORDERED,
ELLEN BREE BURNS, USDJ

Dated at New Haven, Connecticut, this 23rd day of May, 1985.

DECISION ON PLAINTIFF'S MOTION FOR CLARIFICATION AND RECONSIDERATION

"9/3/85 denied," with signature: Ellen B. Burns, USDJ, endorsed on motion.

DETAILED ORDER

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of November, one thousand nine hundred and eighty-three.

Present:

Honorable Irving R. Kaufman,

Honorable Ellsworth Van Graafeiland,

Circuit Judges,

Honorable Clement F. Haynsworth, Jr.,

US Court of Appeals, Fourth Circuit,

sitting by designation.

GERALDINE FENNELL, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

against

83-7473

WARNER LAMBERT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

1. The trial court's dismissal of appellant's suit for failure to prosecute was not an abuse of discretion. In a motion for dismissal under Fed. R. Civ. P. 41(b), the trial court may properly consider the relationship between the litigant and her

attorney. See, e.g., Link v. Washburn Railroad Co., 370 US 626 (1962). In the instant case, appellant failed to prosecute for over four years, apparently because of a dispute with counsel. Fennell would not permit her attorney to withdraw, nor would she allow the discovery procedure agreed upon in 1978 to proceed. A delay in effecting agreed discovery is a proper factor to be considered in deciding whether to dismiss a case under Rule 41(b). See, e.g., Chira v. Lockheed Aircraft Corp., 634 F 2d 664, 668 (2d Cir. 1980). In sum, the trial judge considered relevant aspects of the history of the litigation in making her determination that the case should be dismissed. No clear abuse of discretion is shown. See, e.g., Lyell Theatre Corp. v. Loews Corp., 682 F 2d 37 (2d Cir. 1982).

2. Appellant's other assertions are equally without merit.

3. Accordingly, the judgment is affirmed.

ORDER DENYING PETITION FOR REHEARING IN BANC

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of March one thousand nine hundred and eighty-four.

DR. GERALDINE FENNELL, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

WARNER LAMBERT COMPANY,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant, Dr. Geraldine Fennell, etc., pro-se,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk.

by Francis X. Gindhart,
Chief Deputy Clerk.

1983 DECISION OF DISTRICT COURT: RULING

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DR. GERALDINE FENNELL :

V. : CIVIL NO. N77-252

WARNER LAMBERT COMPANY :

RULING ON DEFENDANT'S MOTION TO DISMISS

This action, filed in 1977 by a former employee of defendant Warner Lambert Company who alleges she was unlawfully discharged on the basis of sex,[1] is before the Court for resolution of troublesome issues raised by a motion to dismiss for failure to prosecute. Pursuant to Rule 41(b) of the F. R. of Civ. P.[2] and Local

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1 Plaintiff alleges defendant violated her rights under Title VII of the Civil Rights Act of 1964, 42 USC §2000e et seq.

2 In relevant part, Rule 41(b) states: "for failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

Rule 16(a) of the Rules of Civil Procedure of the United States District Court for the District of Connecticut,[3] defendant urges dismissal on the grounds that plaintiff has not prosecuted the case diligently, has not conducted discovery necessary to prepare for trial and failed to explain why dismissal was inappropriate when required to do so by order of the clerk of the court under Local Rule 16(a). Defendant contends plaintiff's languor has prejudiced it because crucial witnesses have died, left the employ of defendant, or suf-

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[3] Local Rule 16(a) provides:

> In civil actions in which no action has been taken by the parties for one year, the clerk shall give notice of proposed dismissal to counsel of record on or before the first of October in each year. If such notice has been given and no action has been taken in any civil action in the meantime and no satisfactory explanation is submitted to the court within 30 days thereafter, the Clerk shall enter an order of dismissal. Any such order entered by the Clerk under this rule may be suspended, altered, or rescinded by the court for cause shown. (Emphasis added).

fered the usual dimming of memory that occurs with the passage of time. Plaintiff denies defendant's claim of prejudice and shifts the blame to Warner Lambert for the fact that this case has not progressed beyond preliminary stages of discovery. Notwithstanding the Court's reluctance to deprive any party of an opportunity for resolution of his or her case on its merits, the Court is of the opinion that this case is one of the few where the drastic remedy of dismissal is the proper sanction for plaintiff's failure to prosecute diligently.

DISCUSSION

There can be no question that this Court has the inherent power to dismiss a case from its docket because of a plaintiff's failure to prosecute the action. Chira v. Lockheed Aircraft Corp., 634 F 2d 664, 665 (2d Cir. 1980). This power should be exercised sparingly, however, and only where the entire procedural his-

tory of the case demonstrates that the plaintiff has not prosecuted the action with diligence. Merker c. Rice, 649 F 2d 171, 173-74 (2d Cir. 1981). While prejudice to the defendant is not a precondition to dismissal, its absence is a relevant consideration where the failure to prosecute is moderate or attributable to excusable neglect. Messenger v. United States, 231 F Supp. 328, 331 (2d Cir. 1956); SEC v. Everest Management Corp., 466 F Supp 167, 171 (SDNY 1979). Additionally, a defendant who has contributed to the problem should not be rewarded with a windfall dismissal when a lesser sanction will suffice. See Index Fund, Inc. v. Hagopian, 90 FRD 574, 580 (1981).

From its commencement on June 17, 1977, until the Court denied plaintiff's motion for partial summary judgment on January 3, 1980, this case was litigated diligently by both parties. Since early 1980, on the other hand, virtually the only action in

this case has been unsuccessful attempts by counsel for plaintiff to withdraw from the case. On December 14, 1979, plaintiff's attorney filed his first motion to withdraw. While that motion was still pending, counsel filed a second motion to withdraw on June 20, 1980. On November 25, 1980, this Court denied the first motion on the grounds that counsel had not shown the requisite good cause for withdrawal. Though the second motion was not similarly denied or otherwise endorsed, it appears the Court and the parties treated that motion as withdrawn without prejudice to renewal.

The next action in this case was initiated by the Clerk of the United States District Court for the District of Connecticut who, acting pursuant to Local Rule 16, notified plaintiff on April 29, 1981, that "[t]he case below is subject to being dismissed ... [u]nless some action is taken

or a satisfactory explanation of why it should not be dismissed is submitted to the Court within thirty (30) days ...." Three weeks later, by letter dated May 21, 1981, counsel for plaintiff advised the clerk of the court that the case should not be dismissed since his motion to withdraw was not ruled on until November 25, 1980, and because "discussions between myself and Dr. Fennell have been protracted, but should be concluded in the next month or less." In light of this response, plaintiff's period for complying with the Rule 16 notice was extended to September 22, 1981. Despite this extension, plaintiff did not prosecute the case and the next proceeding in the action was on November 17, 1981, when Magistrate Latimer, acting at the request of this Court, issued a briefing schedule on the second motion to withdraw as counsel. Although this procedure gave counsel a second op-

portunity to justify his motion for withdrawal, counsel ignored the briefing schedule and consequently the motion was denied on December 18, 1981. It should be noted that defendant, who obtained an extension of time to respond to the briefing schedule and who apparently was unaware that the motion had been denied, wrote to the magistrate on December 22, 1981, asking that the case be dismissed due to plaintiff's failure to take any action on the case by September 22, 1981, as required by the Rule 16 notice.

The Court did not act on the defendant's request to dismiss and the clerk of the court did not dismiss the action automatically for plaintiff's failure to comply with the Rule 16 notice. Instead, this Court referred the case to Judge Zampano for a pre-trial conference. A conference was held on March 26, 1982, but the case was not settled and still plaintiff took

no action to prosecute the suit. To ascertain the status of the case, this Court held a conference on December 14, 1982.Counsel for plaintiff suggested the Court should impose a final discovery schedule so the case could soon be ready for trial. Counsel for defendant, however, strongly objected to this recommendation and renewed his request that the action be dismissed for failure to prosecute. At the close of the conference the Court instructed counsel that it would entertain motions to compel and a motion to dismiss. Thereafter, on December 29, 1982, defendant filed its motion to dismiss and, on January 18, 1983, plaintiff moved to compel answers to interrogatories dated May 3, 1978. Magistrate Latimer denied both motions by endorsement on February 16, 1983, and both parties filed objections to those rulings.

In opposition to the motion to dismiss, which under Local Rule 2 for United States

Magistrates is before the Court for a de novo determination, counsel for plaintiff argues that he never disobeyed any order of the Court and that the lack of progress toward readiness for trial is attributable to defendant's consistent refusal to respond to outstanding interrogatories. As for the first contention, the file shows that plaintiff never complied with the Rule 16 notice that was extended until September 22, 1981. Although Magistrate Latimer considered a renewed motion to withdraw in late 1981, counsel cannot claim credit for renewing the motion since he never responded to the briefing schedule. In addition, the motion was not revewed within the time period established by the Rule 16 notice. Finally, inasmuch as defendant objected to the renewed motion to withdraw on the grounds that the case should be dismissed for failure to prosecute, it cannot be asserted that defendant acquiesced in the

continued status of the case as a pending action.

With respect to plaintiff's second argument shifting the blame to defendant, it is not supported by the record. Contrary to the position now taken by plaintiff, throughout the past three years the onus has been on plaintiff to comply with defendant's request for production of documents before defendant could be required to respond to plaintiff's interrogatories. Moreover, by Stipulation of November 21, 1978, it was agreed that defendant would not respond to plaintiff's first and only set of interrogatories "until after further application for such compliance ...." No such further application was made until January 18, 1983. In addition, as reflected in a letter to plaintiff's counsel on November 15, 1978, it was defendant's understanding that both sides would exchange certain documents

before proceeding to further discovery. By letter dated January 22, 1979, counsel for defendant notified plaintiff's counsel of the specific documents it was requesting. On February 12, 1979, plaintiff's counsel gave defendant various documents but objected to the production of others. Defendant responded with a letter dated March 20, 1979, in which counsel listed the documents received, observed that he could not reply to plaintiff's objection because it was not addressed to specific documents, and suggested "that we hold this discovery situation in abeyance until after the resolution of the Motion for Partial Summary Judgment ... ."

Plaintiff's motion for partial summary judgment was denied on January 3, 1980, and the next indication of an intent to litigate the case was in a letter of January 13, 1981, to plaintiff's counsel where counsel for defendant stated, in response

to a telephone inquiry regarding the scheduling of plaintiff's deposition, that "[d]efendant desires to take plaintiff's deposition as soon as possible ... [after we] complete our examination of plaintiff's documents." In response to this letter, plaintiff's counsel sent defendant a letter dated January 19, 1981, stating, "I will respond to your inquiry regarding production of documents as soon as I have instructions from my client regarding that issue." No respose was forthcoming, however, and the next communication from plaintiff's counsel was a letter dated December 15, 1982, a day after the Court held a status conference. In his letter counsel took the position that he had "not agreed to defer compliance [with the interrogatories] at any time since December 29, 1980," when he asserts he requested compliance by telephone. This position seems to contradict that taken by counsel in his letter of January 19, 1981, and, in

any event, the stipulation of November 21, 1978, required plaintiff to make written application to the Court for compliance with the interrogatories. Thus, plaintiff's assertion that the delayed progress of the case should be attributed to defendant's "intransigent posture" is untenable in light of the agreement, long ago embodied in a stipulation and reflected in correspondence, that document production would precede other discovery.

Given this procedural history, necessarily reviewed here at length, the Court cannot fairly avoid the conclusion that this case has not been prosecuted with due diligence. In addition to plaintiff's complete noncompliance with the Rule 16 order, plaintiff has taken no action to prepare her case for trial since the Court denied her motion for partial summary judgment. Although dismissal is a harsh remedy, it must be recognized that "[d]elays have dan-

gerous ends, and unless district judges use the clear power to impose the ultimate sanction when appropriate, exhortations of diligence are impotent." Chira v. Lockheed Aircraft Corp., supra at 668.In this case, where plaintiff was put on notice of possible dismissal by a Rule 16 notice in 1981 but took no action until 1983, despite defendant's request for dismissal in late 1981, the Court reluctantly concludes that dismissal is appropriate.

CONCLUSION

For the reasons herein stated, defendant's objections to the ruling of Magistrate Latimer on its motion to dismiss for failure to prosecute are sustained and, after a de novo review, the motion to dismiss is granted.

SO ORDERED,
ELLEN BREE BURNS
USDJ

DATED: New Haven, Connecticut, 2 May 1983

JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT

DR. GERALDINE FENNELL :

VS. :

WARNER LAMBERT COMPANY:

CIVIL NO.

N 77-252

JUDGMENT

This cause came on for consideration on defendant's motion to dismiss before the Honorable Arthus H. Latimer, United States Magistrate, and on February 10, 1983, said motion having been denied, and, thereafter, the objection to said denial having come for consideration before the Honorable Ellen Bree Burns, United States District Judge, and a Ruling on Defendant's Motion to Dismiss having been filed on May 2, 1983, granting said motion, after a de novo review,

It is ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the defendant dismissing this action.

Dated: New Haven, Connecticut, May 6, 1983.

No. 85-1887 (8)

Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GERALDINE FENNELL,
on behalf of herself and all others similarly situated,
Petitioner,

—against—

WARNER-LAMBERT COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the District Court commit an abuse of its discretion in refusing, on grounds of "mistake of substance," to set aside, under Rule 60(b)(1) of the Federal Rules of Civil Procedure, its prior judgment of dismissal in this case for lack of prosecution and in denying Petitioner's subsequent motions for reconsideration, an evidentiary hearing, and further clarification and reconsideration; where:

(a) the action had been commenced in June 1977 and was based upon events which are alleged to have occurred between 1971 and 1974; and

(b) the action had been dismissed in May 1983 for lack of prosecution under Rule 41(b) of the Federal Rules of Civil Procedure and Rule 16(a) of the Rules of Civil Procedure for the United States District Court for the District of Connecticut, the dismissal had been affirmed by the Second Circuit in 1983, and certiorari had been denied by this Court in 1984; and

(c) Petitioner's failure to prosecute the action for many years was the result of a running dispute with her counsel, whom she adamantly refused either to discharge, permit to withdraw, or proceed with the case; and

(d) all matters raised in the Rule 60(b)(1) motion could have been raised on Petitioner's appeal from the 1983 dismissal and had, in fact, been so raised?

RULE 28.1 STATEMENT

Respondent Warner-Lambert Company ("Warner-Lambert") has no parent corporations. The common stock of Warner-Lambert is publicly traded on the New York Stock Exchange.

The following is a list of the subsidiaries of Warner-Lambert, as set forth in Exhibit 22 to the Form 10-K filed by Warner-Lambert with the Securities and Exchange Commission, showing the state or country of incorporation and the percentage of voting securities owned by Warner-Lambert or by subsidiaries of Warner-Lambert as of December 31, 1985.

"Name of Corporation	State or Country of Organization		Percentage of Ownership
dams, S.A.	Spain	100	
dams Portugal Comercio e Industria Limitada	Portugal	90	
		10	Chicle Adams, Inc.
hmex, S.A. de C.V.	Mexico	100	
Chicle Adams, S.A. de C.V.	Mexico	100	Ahmex, S.A. de C.V.
Compania Medicinal La Campana, S.A. de C.V.	Mexico	100	Ahmex, S.A. de C.V.
merican Chicle Company	Delaware	100	
merican Food Industries, Inc.	Delaware	100	
Clark Gum Company Morocco	Morocco	100	American Food Industries, Inc.
.A. Lady	Venezuela	100	
Chicle Adams, S.A.	Venezuela	90	C.A. Lady
		10	Chicle Adams, Inc.
hicle Adams, Inc.	New York	100	
irsa, S.A.	Venezuela	100	
Velarca, S.A.	Venezuela	80	Cirsa, S.A.
lark Gum Company N.V.	Belgium	100	

Name of Corporation	State or Country of Organization		Percentage of Ownership
Compania de Chicle Adams, Inc.	New York	100	
Chicle Adams del Uruguay S.A.	Uruguay	100	Compania de Chicle Adams, Inc.
Parke Davis & Cia. de Argentina S.A.I.C.	Argentina	100	Compania de Chicle Adams, Inc.
Warner-Lambert Argentina, S.A.	Argentina	81.5	Compania de Chicle Adams, Inc.
		18.5	Warner Lambert Company AG
Distribuidora Mercantil Centro Americana, S.A.	Delaware	100	
Dismercasa de Costa Rica, Sociedad Anonima	Costa Rica	100	Distribuidora Mercantil Centro Americana, S.A.
Empresas Warner Lambert S.A.	Chile	70.6	
		29.4	Parke-Davis
Euronett, Inc.	Delaware	100	
Exchic, C.A.	Venezuela	100	
Family Products Corp.	New York	100	
Laboratorios Laprofa, Sociedad Anonima	Guatemala	100	Family Products Corp.
Laboratorios Warner Ltda.	Brazil	100	Family Products Corp.
FIRAP, N.V.	Belgium	100	
IMED Corporation	Delaware	100	
IMED Ireland Limited	Ireland	100	
Internacional Participacoes Ltda.	Brazil	100	
Warner-Lambert Industria e Comercio Ltda.	Brazil	100	Internacional Participacoes Ltda.

Name of Corporation	State or Country of Organization		Percentage of Ownership
Chadams Participacoes e Comercio Ltda.	Brazil	100	Warner-Lambert Industria e Comercio Ltda.
nternational Affiliated Corporation	Delaware	100	
Goedecke Aktiengesellschaft .	Germany	87.96	International Affiliated Corporation
		11.64	
Adenylchemie G.m.b.H. ...	Germany	100	Goedecke Aktiengesellschaft
Goedecke Gesellschaft m.b.H.....	Austria	100	Goedecke Aktiengesellschaft
International Company for Gum and Confectionery (Incogum) S.A.E.	Egypt	57	Goedecke Aktiengesellschaft
Panserv-Anzeigen-Service G.m.b.H.	Germany	100	Goedecke Aktiengesellschaft
Parke Davis Afrique de l'Ouest	Senegal	100	Goedecke Aktiengesellschaft
W. R. Warner & Co. G.m.b.H.	Germany	100	Goedecke Aktiengesellschaft
Goedecke Beteiligungs-und Vertriebs G.m.b.H.	Germany	100	International Affiliated Corporation
Goedecke Vertriebs G.m.b.H. & Co.	Germany	75	Goedecke Beteiligungs- und Vertriebs G.m.b.H.
		25	Adenylchemie G.m.b.H.
arke-Davis Sendirian Berhad	Malaysia	100	International Affiliated Corporation

Name of Corporation	State or Country of Organization		Percentage of Ownership
Keystone Chemurgic Corp.	Delaware	100	
Chicle Adams C.A. Limited .	Bermuda	100	Keystone Chemurgic Corp.
Productos Adams, S.A.	Guatemala	100	Keystone Chemurgic Corp.
Laboratorios Substantia, C.A...	Venezuela	80	
Lambert & Feasley, Inc.	New York	100	
Lambert Pharmacal Company (N.Z.) Limited	New Zealand	100	
*Meito Adams Co., Ltd.	Japan	50	
Parfums Ciro, Inc.	Delaware	100	
Parke, Davis & Company ("Parke-Davis")	Michigan	100	
R. Jung G.m.b.H.	Germany	100	Parke-Davis
P-D Co., Inc.	Delaware	100	Parke-Davis
Davpar Company	Switzerland	100	P-D Co., Inc.
Capsugel AG	Switzerland	100	Davpar Company
S.A. Capsugel N.V. ..	Belgium	100	Davpar Company
Hidracina Y Derivados, S.A.	Spain	100	Davpar Company
Laboratorios Parke Davis, S.A.E.	Spain	100	Davpar Company
N.V. Parke, Davis & Cie., S.A.	Belgium	100	Davpar Company
Quimica Sintetica, S.A.	Spain	100	Davpar Company
Societe Financiere et Commerciale de Cadillac	France	100	Davpar Company
Parke-Davis (Thailand) Limited	Thailand	100	P-D Co., Inc.

* Subsidiary not consolidated.

Name of Corporation	State or Country of Organization		Percentage of Ownership
rke, Davis & Company, Inc.	Philippines	100	Parke-Davis
rke, Davis & Company, Limited	Pakistan	75	Parke-Davis
rke Davis Inter-American Corporation	Delaware	100	Parke-Davis
Compania Farmaceutica Parke-Davis S.A.	Guatemala	100	Parke-Davis Inter-American Corporation
rke Davis International Limited	Bahamas	100	Parke-Davis
rke Davis Pty. Limited	Australia	100	Parke-Davis
Warner-Lambert Pty. Limited	Australia	100	Parke Davis Pty. Limited
Warner-Lambert (Services) Pty. Ltd.	Australia	100	Parke Davis Pty. Limited
rke Davis de Venezuela, C.A.	Venezuela	100	Parke-Davis
arner-Lambert K.K.	Japan	100	Parke-Davis
Capsugel Asian Marketing K.K.	Japan	100	Warner-Lambert K.K.
Parke, Davis K.K.	Japan	100	Warner-Lambert K.K.
e-Davis Sales Corporation	Virgin Islands	100	
e-Davis S.p.A.	Italy	98.50	
		1.50	Parke-Davis
ard Hudnut Limited	New Zealand	100	
hilab (Realty) Limited	New Zealand	50	Richard Hudnut Limited
		50	Warner-Lambert (NZ) Limited
arner-Chilcott (Mfg) Limited	New Zealand	50	Richard Hudnut Limited
		50	Warner-Lambert (NZ) Limited
ard Hudnut, S.A.	Spain	100	
k Interamericana, S.A.	Venezuela	100	

Name of Corporation	State or Country of Organization		Percentage of Ownership
Servicos Tecnicos e Comercio Sertico Ltda	Brazil	100	
Protequim Produtos Tecno-Quimicos Ltda	Brazil	100	Servicos Tecnicos e Comercio Sertico Ltda.
Societe Civile de Recherches Techniques S.A.R.L.	France	100	
Substantia	France	90	
		10	Parfums Ciro, Inc.
Parke-Davis	France	100	Substantia
Substantia Gesellschaft m.b.H.	Austria	100	
Tabor Corporation	Delaware	100	
TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.	Germany	100	(Indirect)
Biorell G.m.b.H.	Germany	100	TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.
HILENA Biologische und Chemische Erzeugnisse G.m.b.H.	Germany	100	Biorell G.m.b.H.
West-Aquarium G.m.b.H.	Germany	100	TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.
West-Aquarium G.m.b.H. & Co. KG	Germany	96.5	TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.
		3.5	West-Aquarium G.m.b.H.
Zoomedica Frickhinger G.m.b.H.	Germany	100	TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.
Warner-Chilcott Inc.	Delaware	100	
Warner-Lambert Canada Inc.	Canada	100	
Adams Brands Inc.	Canada	100	Warner-Lambert Canada Inc.

Name of Corporation	State or Country of Organization		Percentage of Ownership
Deseret Canada Inc.	Canada	100	Warner-Lambert Canada Inc.
Eversharp Canada Inc.	Canada	100	Warner-Lambert Canada Inc.
Parke-Davis Canada Inc.	Canada	100	Warner-Lambert Canada Inc.
arner-Lambert Company AG	Switzerland	100	
Adams (Thailand) Limited	Thailand	100	Warner-Lambert Company AG
Laboratorio Substancia/ Parke-Davis, S.A.	Spain	75	Warner-Lambert Company AG
		25	
Warner-Lambert (East Africa) Limited	Kenya	100	Warner-Lambert Company AG
Warner-Lambert Export Limited	Ireland	100	Warner-Lambert Company AG
arner-Lambert Espana, S.A.	Spain	100	
arner-Lambert France Ltd.	Delaware	100	
arner-Lambert Gesellschaft m.b.H.	Austria	100	
arner-Lambert Holland B.V.	Netherlands	100	
B.V. Substantia	Netherlands	100	Warner-Lambert Holland B.V.
Substantia—Produtos Farmaceuticos, Limitada	Portugal	95.5	B.V. Substantia
		.5	Substantia
Schick Nederland B.V.	Netherlands	100	Warner-Lambert Holland B.V.
J.P. Distributie N.V.	Belgium	100	Schick Nederland B.V.
arner-Lambert Inc.	Nevada	100	
arner-Lambert International Company	Delaware	100	
arner-Lambert International N.V.	Netherlands Antilles	100	

Name of Corporation	State or Country of Organization	Percentage of Ownership	
Warner-Lambert Ltd.	Delaware	100	
Warner-Lambert de Panama, Sociedad Anonima	Panama	100	Warner-Lambert Ltd.
Warner-Lambert Manufacturing (Ireland) Ltd.	Cayman Islands, British West Indies	100	
Warner-Lambert (NZ) Limited	New Zealand	100	
Warner-Lambert Philippines, Inc.	Philippines	56.1	
		43.9	Parke-Davis
Warner-Lambert S.A. (Proprietary) Limited	South Africa	100	
Warner-Lambert Scandinavia Aktiebolag	Sweden	100	
Warner-Lambert Sweden Aktiebolag	Sweden	100	Warner-Lambert Scandinavia Aktiebolag
Warner-Lambert (Schweiz) AG	Switzerland	100	
Warner-Lambert Technologies, Inc.	Texas	100	
Warner Lambert Holding Gesellschaft m.b.H.	Austria	100	Warner-Lambert Technologies, Inc.
C. Reichert Optische Werke AG	Austria	99.95	Warner-Lambert Holding Gesellschaft m.b.H.
C. Reichert Handelsgesellschaft m.b.H.	Austria	100	C. Reichert Optische Werke AG
Reichert-Jung	France	100	C. Reichert Optische Werke AG
W-L Technologies (Japan) Inc.	Japan	100	Warner-Lambert Technologies, Inc.
Warner-Lambert Technologies (Asia) Ltd.	Delaware	100	Warner-Lambert Technologies, Inc.

Name of Corporation	State or Country of Organization		Percentage of Ownership
arner-Lambert (U.K.) Limited	Delaware	100	
Reichert-Jung Limited	United Kingdom	100	Warner-Lambert (U.K.) Limited
Warner-Lambert Health Technologies Limited	United Kingdom	100	Warner-Lambert (U.K.) Limited
IMED Management Services Limited	United Kingdom	100	Warner-Lambert (U.K.) Limited
Parke Davis & Co. Limited	Jersey, Channel Islands	100	Warner-Lambert (U.K.) Limited
William R. Warner & Co., Limited	United Kingdom	100	Warner-Lambert (U.K.) Limited
Adams Brands Sales, Limited	United Kingdom	100	William R. Warner & Co., Limited
Chilcott Laboratories, Limited	United Kingdom	100	William R. Warner & Co., Limited
Hall Brothers (Whitefield) Limited	United Kingdom	100	William R. Warner & Co., Limited
Richard Hudnut Limited	United Kingdom	100	William R. Warner & Co., Limited
Lambert Chemical Company, Limited	United Kingdom	100	William R. Warner & Co., Limited
TetraMin (U.K.) Limited	United Kingdom	100	William R. Warner & Co., Limited

The foregoing list omits 10 domestic subsidiaries and 57 foreign subsidiaries which nsidered in the aggregate would not constitute a significant subsidiary."

The only changes that have occurred since December 31, 1985 are as follows:

(a) Ahmex, S.A. de C.V. has changed its name to Warner-Lambert de Mexico, S.A. de C.V.

(b) Lambert Pharmacal Company (N.Z.) Limited has transferred its shares to Warner-Lambert (NZ) Limited, a wholly owned subsidiary of Warner-Lambert Company.

(c) R. Jung G.m.b.H. was sold to a third party subsequent to December 31, 1985.

(d) Parke, Davis K.K. is subject to a pending sale to a third party.

(e) Servicos Tecnicos e Comercio Sertico Ltda. and Protequim Produtos Tecno-Quimicos Ltda. have been sold to a third party subsequent to December 31, 1985.

(f) Although still owned by Warner-Lambert Company, Deseret Canada Inc. will have its name changed by July 30, 1986.

(g) Warner Lambert Holding Gesellschaft m.b.H., C. Reichert Optische Werke AG, C. Reichert Handelsgesellschaft m.b.H., Reichert-Jung, W-L Technologies (Japan) Inc., Warner-Lambert Technologies (Asia) Ltd. and Reichert-Jung Limited have been sold to a third party subsequent to December 31, 1985.

(h) Warner-Lambert Health Technologies Limited and IMED Management Services Limited are subject to a pending sale to a third party.

(i) IMED Corporation and IMED Ireland Limited are subject to a pending sale to a third party.

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Rules of Civil Procedure of the United States District Court for the District of Connecticut, Rule 16	2, 4, 5, 10
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No. 85-1887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GERALDINE FENNELL,
on behalf of herself and all others similarly situated,
Petitioner,

—against—

WARNER-LAMBERT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of respondent Warner-Lambert Company ("Warner-Lambert") in opposition to the petition for a writ of certiorari.

RULES INVOLVED

Rule 60(b)(1), Federal Rules of Civil Procedure, provides in relevant part:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;

Also involved are:

Rule 41(b), Federal Rules of Civil Procedure, which provides in relevant part:

> Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 16, Local Rules of Civil Procedure for the United States District Court for the District of Connecticut, in the form in which it existed at all times relevant to this case, provides:*

> Dismissal of Actions by the Clerk
>
> (a) For failure to prosecute.
>
> In civil actions in which no action has been taken by the parties for one year, the clerk shall give notice of proposed dismissal to counsel of record. If such notice has been given and no action has been taken in any civil action in the meantime and no satisfactory explanation is submitted to the court within thirty days thereafter, the clerk shall enter an order of dismissal. Any such order entered by the clerk under this rule may be suspended, altered, or rescinded by the court for cause shown.

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* Rule 16(a) was amended effective January 1, 1984.

STATEMENT OF THE CASE

On June 17, 1977, Geraldine Fennell ("Fennell") commenced this action, charging that she was discharged in 1974 because of sex discrimination and in reprisal for events which are alleged to have occurred in 1971. (A6-A15)* Although she now appears *pro se*, Fennell was represented by counsel throughout the litigation until the case was dismissed in May 1983 for lack of prosecution.

At the time Warner-Lambert filed its motion to dismiss, the case was five and one-half years old. Yet, except for production in 1977 and 1979 of a small number of documents, there had been no discovery in the case whatsoever.

In 1978, counsel for the parties developed and agreed upon a discovery program which, however, was for the most part held in abeyance because of the pendency of Fennell's motion for partial summary judgment in respect of defenses based upon her failure to timely file her charge of discrimination and her failure to file any charge of retaliation with the EEOC as required by law. (A111-A118)

On January 3, 1980, the District Court denied the summary judgment motion and the road was then clear to resume discovery. (A69-A79) During the next three years, however, Fennell failed to proceed with discovery as previously agreed upon and, instead, appears to have focused her attention on a dispute with her attorney, whom she refused to allow either to withdraw from, or resume work on, the case.

In May 1979, several weeks after the argument of Fennell's summary judgment motion, her counsel told Fennell that he wished to withdraw as her attorney and that she should seek other counsel. Then, on December 14, 1979, her counsel filed a motion requesting leave to withdraw. (A66-A67) On

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*References to "A " are to the Appendix submitted by the Defendant-Appellee to the Second Circuit dated November 25, 1985.

June 20, 1980, while that motion was still technically pending, Fennell's counsel filed a second motion for leave to withdraw as counsel. (A80) Fennell, however, adamantly refused to agree to her counsel's withdrawal and the District Court denied the application. (A66, A80)

Having thus persuaded the District Court to deny counsel's motion to withdraw, Fennell nevertheless refused to let him proceed with the case. As Fennell herself stated in 1983 in her principal brief to the Second Circuit seeking reversal of the judgment of dismissal:

> Freely, to have gone along with Mr. Cochran's withdrawal as counsel on the grounds that I distrusted him or, following Judge Burn's denial of his (first) motion to withdraw, to have allowed him to resume work on my case as though the whole episode had not happened and in the light of his subsequent response to my questions, or to have released him, left too many questions unanswered. I felt that my actions from then one [sic] under any of the three options, would not be the informed actions of a responsible person. (A282-A283)

It is thus clear that the failure to proceed with discovery subsequent to the November 1980 denial of counsel's motion to withdraw stemmed directly from Fennell's refusal to allow her counsel to resume work on the case.

On April 29, 1981, the Clerk of the District Court issued a notice under Local Rule 16 of proposed dismissal for Fennell's failure to prosecute. (A94)

Thereafter, in response to a letter from Fennell's counsel, the Clerk extended until September 22, 1981 the date by which Fennell was required to take some action in the case or furnish a satisfactory explanation as to why the action should not be dismissed. (A96) The September 22, 1981 date arrived, but no action to prosecute the case had been taken and no explanation had been given as to why the action should not be dismissed.

On December 22, 1981, counsel for Warner-Lambert wrote a letter to the Court requesting that the action be dismissed for Fennell's failure to comply with Local Rule 16. (A103-A104) On January 4, 1982, Fennell personally wrote a letter to the Clerk of the District Court opposing Warner-Lambert's request that the case be dismissed. (A105) Nevertheless, during the next year, Fennell did not take a single step to proceed with outstanding discovery matters.

The Court held a status conference on December 14, 1982. At that time, this case was almost five and a half years old. It related to events some of which had occurred more than a decade earlier. A key witness having knowledge of the circumstances surrounding Fennell's 1974 termination had died. A number of other witnesses had left Warner-Lambert. The passage of time and the involvement of these witnesses in other activities had undoubtedly diminished their recollections as to the events in issue. (A108-A110) As the District Court noted in its 1985 ruling denying the motion for relief from judgment:

> Although not, perhaps, explicit enough for plaintiff, the court did find defendant's claims of prejudice by delay credible and a factor weighing in favor of dismissal. Surely plaintiff must recognize that if the court found defendant had been prejudiced by delay in May of 1983, the situation was even more difficult in May of 1984, when plaintiff filed this motion, and the obstacle was that much harder for plaintiff to overcome as of that date. (Plaintiff was discharged by defendant over a decade ago.) (Pet., D-12)*

On December 29, 1982, Warner-Lambert moved to dismiss the action pursuant to Rule 41(b), Federal Rules of Civil Procedure, and Rule 16(a), the Rules of Civil Procedure of the United States District Court for the District of Connecticut, for Fennell's failure to prosecute. (A106-A107) After a

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* References to "Pet., " are to the Appendix of Fennell's Petition for Writ of Certiorari.

hearing on March 7, 1983, the District Court, on May 2, 1983, granted the motion to dismiss. (A144-A154, Pet. F1-F15)

On June 6, 1983, Fennell filed *pro se* a notice of appeal. (A155)

The Order of Dismissal was unanimously affirmed by the Second Circuit on November 25, 1983. (Pet., E1-E3) Two motions for rehearing were thereafter denied by that Court.

On October 1, 1984, this Court denied Fennell's petition for a writ of certiorari. An application for an extension of time to file a petition for rehearing was granted to November 14, 1984. A second application for an extension of time was thereafter denied.

In the normal course, this should have brought an end to the litigation. However, on May 4, 1984, just short of a year after the original judgment of dismissal had been entered, and after the Court of Appeals for the Second Circuit had entered its order affirming the dismissal and denying the first of the two petitions for rehearing, Fennell filed a motion under Rule 60(b)(1) for relief from judgment on the grounds that there had been "mistakes of substance . . . ." (A162-A163) This motion, which sought to yet again argue the matters previously decided, was denied on March 5, 1985. (A185-A194, Pet. D1-D14)

In said motion, Fennell focused on certain aspects of the District Court's May 1983 opinion. The "main mistake" ascribed to the District Court was its alleged failure to take into account an October 1977 response by Fennell to Warner-Lambert's request for production of documents. There was, however, not the slightest suggestion in the District Court's original opinion that it had been unaware of or failed to take into account Fennell's October 1977 response to Warner-Lambert's document request, and in its opinion denying relief from judgment, the District Court states that it "was and is aware" of the 1977 response. (Pet. D-3) The second alleged

"mistake" consisted of a reference in the original 1983 District Court opinion to a letter dated January 22, 1979 by counsel for Warner-Lambert, enumerating "specific documents" that it was requesting. The Court's alleged error consisted of its reference to "specific documents" when the letter referred to specific *categories* of documents. This nitpicking distinction, too, was dealt with by the District Court which concluded "there can be no serious dispute that plaintiff's counsel was fairly apprised of what documents defendant wanted from plaintiff." (Pet. D-4) Finally, a claim by Fennell that there was no stipulation "in the record" regarding document production ignored the fact, specifically found by the District Court in denying the Rule 60 motion, "that the correspondence between counsel does evidence just such an agreement." (Pet. D-5)

Each and every one of these three grounds of "mistake", moreover, could have been argued to the court by Fennell on the original appeal and was in fact so argued. (A266-267, 285-286, 288, 344-345, 357, 359, 362, 364)

Subsequent motions for reconsideration, for an evidentiary hearing, and for clarification and reconsideration were denied on various dates in 1985. (A225-A226, A227-A245)

On January 17, 1986, the Court of Appeals for the Second Circuit affirmed the District Court's denials of the motions for relief from judgment. (Pet., A1-A4) The Second Circuit stated that:

> The basis for Fennell's Rule 60(b)(1) motion and her subsequent motions for reconsideration and clarification are her claims that the district court never realized that Fennell responded in 1977 to Warner's discovery requests, and that the court incorrectly found that the parties entered a stipulation regarding the discovery. The district court's opinion denying appellant's Rule 60(b)(1) motion responded to both these claims. The court stated it knew of Fennell's 1977 response, but

that a single response was insufficient considering Fennell's intractable status in the three years following in which the case was pending. As to the stipulation, the court stated that while no official written stipulation existed, correspondence between the parties evidenced an understanding regarding discovery.

Both of these findings are supported by the record.

On February 24, 1986, the Second Circuit denied Fennell's motion for extension of time in which to file a petition for rehearing. (Pet., B) Thereafter, Fennell filed a "Motion For Review of Action of One Judge," seeking to have the Court of Appeals review the denial of an extension of time to file the Petition for Rehearing. This motion was denied on May 7, 1986. (Pet., B)

ARGUMENT

I. No Reason Exists for Granting the Writ of Certiorari

As is obvious from the Petition itself, despite this Court's prior denial of certiorari in 1984, Fennell seeks to have this Court review, still again, the facts found by the District Court, reviewed by the Court of Appeals in 1983, reconsidered by the District Court on the Rule 60(b)(1) motion in 1985, and reviewed yet again by the Court of Appeals in 1986. This Court, however, does "not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

None of the considerations which would justify the grant of certiorari were present when this Court denied certiorari in 1984 and none are present here.

II. The Decision Below Was Clearly Correct

On May 4, 1984, Fennell filed a motion for relief from judgment under Rule 60(b)(1) alleging "mistakes of substance . . ." in the District Court's original 1983 ruling. This motion was denied by the District Court on March 5, 1985.

It is clear that a Rule (60)(b) motion is not a substitute for appeal. *Eutectic Corp.* v. *Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979). As this Court has made clear in *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 263, n.7 (1978), the underlying judgment is not brought up for review by an appeal from a denial of a Rule 60(b) motion:

> A timely appeal may be taken under Fed. Rule App. Proc. 4(a) from a ruling on a Rule 60(b) motion. The Court of Appeals may review the ruling only for abuse of discretion, however, and *an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review. See Daily Mirror Inc.* v. *New York News, Inc.*, 533 F.2d 53 (CA2), *cert. denied*, 429 U.S. 862 (1976); *Brennan* v. *Midwestern Life Ins. Co.*, 450 F.2d 999 (CA7 1971), *cert. denied*, 405 U.S. 921 (1972); 7 J. Moore, Federal Practice § 60.19, p. 231; § 60.30[3], pp. 430-31 (1975) (emphasis added).

Consequently, the key issue before the Second Circuit was whether the District Court had committed an abuse of discretion in denying the motion for relief from judgment. *See, e.g., Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F.2d 53 (2d Cir. 1976), *cert. denied*, 429 U.S. 862 (1976); *Sampson* v. *Radio Corp. of America*, 434 F.2d 315, 317 (2d Cir. 1970).*

There was no abuse of discretion in denying plaintiff's motion under Rule 60(b)(1). Indeed, it would have constituted an abuse of discretion if the motion had been granted. Fennell's presentation to the District Court on the Rule 60(b)(1) motion related wholly to events which occurred prior

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* Two other issues related to the District Court's jurisdiction to grant such a motion. These issues were not reached by the Court of Appeals. Respondent contends that the Rule 60(b) motion was not timely because it was not made within a "reasonable" time as provided in Rule 60. In the context of a claim of judicial mistake, courts have required such a claim to be made within the thirty-day appeal period. *See Schildhaus* v. *Moe*, 335 F.2d 529, 531 (2d Cir. 1964); *Hoffman* v. *Celebrezze*, 405 F.2d 833, 836 (8th Cir. 1969). Respondent further contends that the District Court lacked jurisdiction to reverse itself because the motion was based on matters included or includable in the prior appeal. *Seese* v. *Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982).

to the date of judgment. All of her claims and arguments could have been presented in the course of the proceedings on the original 1983 motion to dismiss for failure to prosecute and were in fact so presented.

Fennell admits that she would not permit her counsel to proceed with the case, but would not allow him to withdraw. She not only failed to prosecute her case generally, but also failed to comply with a notice under Local Rule 16. In such circumstances, the dismissal of the action by the district Court was not an abuse of discretion; and it certainly was not an abuse of discretion to deny the motion for relief from judgment after affirmance of the 1983 dismissal by the Court of Appeals.

CONCLUSION

Petitioner Fennell is apparently of the view that it is appropriate to relitigate this case indefinitely. All litigation, however, must some day come to an end. The time to end this litigation has long since come.

For each of the reasons assigned, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DR. GERALDINE FENNELL,

on behalf of herself and all others similarly situated,

PETITIONER,

v.

WARNER LAMBERT COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF OPPOSING PETITION

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26 pp

SUMMARY

In depriving me of my right to try my claim, courts ruled on smokescreen issues that Warner Lambert created. Since the real issues remain to be adjudicated, procedural objections (Rspt Brief 8-10) will not survive scrutiny.

The 1986 appellate Detailed Order makes it easier than before for you to examine what actually occurred. Applying principles of basic justice, here, you will see that the outcome must be a decision favorable to me. In a word: I lacked an adequate mechanism and defendant failed to use a tool it could readily command.

1. If you read my petition and compare it with my former petition (83-2063), you will see, contrary to Warner's claims (Rspt Brief 8-9),

-I am raising issues of law, and

-As a result of proceedings on my 60(b) motion, there are new issues and new facts not present before and new bases for asking you to

exercise your power of supervision, e.g.,

..Did the courts apply the burden of proof appropriately given that, in the context of a motion to dismiss, I am the accused?

..Did the district court show a failure of good faith when (May 1985), acknowledging that I had not known of the "possible drastic consequences of the Rule 16 notice," and that it had an "obligation to attempt to solve the representational problem," it continued to deny relief from judgment, grounded solely in "cessation of substantive progress" for a time? (Pet D15-16)

2. You must consider erroneous the March 1985 finding of prejudice by delay (Rspt Brief 5), from which J. Burns retreated in May 1985 (Pet D15-16). It is not reflected in either of the two appellate opinions (Pet Appendix A & E).

Warner Lambert's excerpt (Rspt Brf 7-8) from the 1986 appellate order (Pet A1-4) omits the court's interpretive conclusion (Pet A 4). The court's analysis is favorable to me on the discovery issue Warner Lambert used as a smokescreen to mask their abdicating preparing a defense. Before dismissal, Warner Lambert failed to use tools the rules provide. Time since dismissal flows from their decision to risk all on a groundless motion to dismiss.

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COMMENTATORS

11 Wright & Miller 2873, 244 20

7 Moore 60.18(8) 138 20

TOPICS TO BE ADDRESSED

In my petition, as noted (Pet 19-21), I focused on key issues of the recent appellate Detailed Order. Warner Lambert do not respond to these issues. They present an excerpt (Rspt Brief 7-8) that omits the entire final portion of the Detailed Order, which contains the court's interpretative conclusion. Moreover, their latest paper fails to reflect significant changes in what the appellate court holds to be fact e.g., comparing the two orders:

a) The court no longer (1986) holds that I was "disputing" with my attorney and,

b) In place of a finding of "agreed discovery" (1983), says only that "letters arguably evidence the 'stipulation' referred to" (86).

With these changes, the court cut the ground from under factual claims that Warner Lambert has put forward in these proceedings and which they continue to make (e.g., Rspt Brief pp i, 4, 7-8).

More generally, Warner Lambert would have

you believe that: The issues have long since been adjudicated; I raise no issues of law; They have been prejudiced by delay; Procedural principles bar further consideration. In the past, courts have ignored my clearly documented rebuttals and objections. Since you do not yet have access to the full record, I fear you will simply take Warner Lambert's words at face value. But it is my rights that are in jeopardy and you should accord me the benefit of any doubt. Here I shall make these points:

I. I seek your supervisory intervention because the system broke down here most basically, I think, in regard to the burden of proof;

II. A finding of prejudice by delay is wrong;

III. Because the system has not operated as it should, earlier proceedings present no valid bar to now adjudicating the real issues;

IV. Possibly because my motions were mislabeled, some arguments have been overlooked.

I. BURDEN OF PROOF VIOLATED THROUGHOUT

Although I believe there is an aspect of

this case that is somewhat novel, I think the essential failure has been that the system has not applied its own rules. Although plaintiff in the underlying case, in the context of a motion to dismiss, my role changes to that of an accused. My rights are the ones immediately in jeopardy. The burden of proof falls on my accusers -- on Warner Lambert in claiming I failed to prosecute. Time and again, you will see this fundamental safeguard violated here.

At this point in my draft, I have numerous examples, taken from the five rulings (three district, two appellate), of instances where judges have failed to put the burden of proof on Warner Lambert. Because it would overburden this petition to include such details, I shall focus on how Warner Lambert succeeded in having an appellate court accept, in place of the obvious meaning of my words well-documented in the record before the district court, a misrepresentation of what I had written in my principal brief in my first appeal. Moreover, the

record before the district court contains no basis for Warner Lambert's misrepresentation. Here is part of what I said (A277-84 at 281*):

> [F]rom the time I was first confronted with the problem of Mr. Cochran's attempts to withdraw on unintelligible grounds, I have been plagued by the concern that there is some obvious alternative solution to the problem. I hope I can take assurance that there is not, in the fact that J. Burns did not suggest any alternative approach to me even though I asked her to (e.g., A 97). At the same time, the Judge's omission of any reference to these matters in her ruling is puzzling and troubling. On the other hand, as noted above (A275-7), the clerk's failure to issue a (local) Rule 16 order of dismissal may indicate that the court accepted the existence of the problem with Mr. Cochran as the "satisfactory explanation" required by the local rule.... What I knew at the time was that not understanding Mr. Cochran's reason for wanting to withdraw as counsel left me without the information I needed to manage my affairs responsibly -- either in choosing a new lawyer or in prosecuting my case against Warner Lambert (A92-3, 99). Freely, to have gone along with Mr. Cochran's withdrawal as counsel on the grounds that I distrusted him or, following J. Burns' denial of his (first) motion to withdraw, to have allowed him to resume work on my case as though the whole episode had not happened and in the light of his subsequent response to my questions (A92-3), or to have released him, left too many questions unanswered. I felt that my actions from then on, under any of the three options, would not be the informed actions of a responsible person. It would be unjust to deny me my day

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*"A" refers to pages in Appellee's Appendix

in court in circumstances where I could not responsibly have acted other than as I did and where I made good faith efforts to remedy the situation. The sparse docket entries following denial of my motion for partial summary judgment were due to "inability and not to willfulness, (or) bad faith" on my part. Societe, 1096.

See Warner Lambert's reply to this petition for examples of how it has been misrepresenting what I've said (e.g., Rspt Brief i, & 10):

"Petitioner's failure to prosecute the action for many years was the result of a running dispute with her counsel, whom she adamantly refused either to discharge, permit to withdraw, or proceed with the case" and:
"Fennell admits that she would not permit her counsel to proceed with the case, but would not allow him to withdraw."

I ask you, on what basis can Warner Lambert legitimately claim to speak on these matters? Significantly, its misrepresentations are absent from the recent Detailed Order (Pet A1-4) but they were embodied in the 1983 Detailed Order (Pet E3) as follows:

"In a motion for dismissal under (fed) Rule 41(b), the trial court may properly consider the relationship between the litigant and her attorney... appellant failed to prosecute... apparently because of a dispute with counsel. Fennell would not permit her attorney to with draw, nor would she allow the discovery procedure agreed upon in 1978 to proceed. A delay

in effecting agreed discovery is a proper factor to be considered in deciding whether to dismiss a case under Rule 41(b), Chira(80)"

Consider how annihilating these words were, issuing from a court, given facts such as:

a) My efforts to find help in having Mr. Cochran tell me why he wanted to withdraw included asking J. Burns (A 97, 99) to revive the dormant second motion to withdraw and have it heard by another judge so that Mr. Cochran could feel free to speak his mind;

b) So far as Mr. Cochran -- and hence I -- was concerned, the "discovery procedure agreed upon in 1978" left the next step in Warner Lambert's hands i.e., to renotice my deposition. See J. Burns' finding of May 1985 that "plaintiff and her attorney did not disagree on document production" (Pet Exhibit 3).

Considering, then, that:

1) The basic rule of "innocent till proven guilty" should have been applied to me when I found myself accused of failing to prosecute;

2) The rule had already been applied to Warner

Lambert's benefit when J. Burns denied my motion for partial summary judgment;

3) I had, early on, and repeatedly (A 93, 99) told J. Burns that Mr. Cochran's failing to tell me why he was moving to withdraw was affecting my ability to proceed, and asked for her help and for her guidance;

4) There was no support in the record for Warner Lambert's claim that Mr. Cochran had asked for my authorization to produce more documents or that I was disputing with my lawyer instead of pursuing my case; the question arises: How could Warner Lambert so readily have secured decisions in their favor?

Proceedings on my 60(b) motion revealed the mechanics of what went wrong. In two ways, J. Burns had departed from the record before her: a) In accepting Warner Lambert's unfounded suggestion that Mr. Cochran was asking me to authorize producing "more" documents and I was resisting; b) In failing to cognize in the record that, in opposing Mr. Cochran's motions

to withdraw, I asked for her help in obtaining information I needed to proceed with my case, and for her guidance on how to handle the situation. Moreover, in her original, 1983, ruling granting the motion to dismiss, J. Burns had not revealed that she had departed from the record in these ways, and thus she denied me information I needed to appeal effectively.

But the question remains why J. Burns, and later, the appellate courts, should so readily have been diverted from a straightforward application of basic good practice. Others, sophisticated in the law, may provide more definitive answers than I can. Along the way, lawyers/clerks have pointed out to me some going-in inequities between the parties: Widely-respected names on defendant's team (e.g., Rogers & Wells, Eginton), may have lent face validity to its claims and arguments vis a vis those of a litigant unknown to the legal community. Certainly, as I have carefully read Warner Lambert's briefs, it has seemed to me

that defense counsel have assumed that no one would conduct even the most readily-made check of their statements, or consider the actual meaning of their words in relation to the substantive points at issue. Also, in my 1983 appeal, Warner Lambert may have benefited from the coincidence that the judge who presided at my appeal wrote the Chira opinion, the model for deciding my case, which favored the arguments of Rogers & Wells, defense counsel in both cases, who claimed in both cases some dispute between plaintiff and lawyer. There are important differences between the cases, including the fact that, in Chira, defendant claimed that plaintiff had disobeyed a court order. In my case, it made the weaker claim that I had failed to honor an agreement to produce "more" documents, and supported that false claim by the false claim that my lawyer was asking me to authorize "more" production.

I don't know what the usual procedure is when case assignments produce such coinciden-

ces. I can see that it could be beneficial to all parties to have a judge who has become familiar with some domain of special expertise such as genetic engineering. But when the common features of a former and a new case include a domain of basic legal expertise likely shared by all appellate judges, there is no reason to assume any benefit accrues from having the same judge. Attention is then focused on whether or not the remaining common features between the former and new cases are likely to favor one party over the other. Here the coincidence of a defense lawfirm making similar arguments to ones the judge presiding in the new case had earlier found persuasive, has the potential for bias. It would not be be surprising if real differences between the cases were overshadowed by an unexamined sense of dejà vu -- that court and defense counsel had covered the ground before.

Common sense suggests that the presence of such factors is not sufficient to produce the

failure to do justice that occurred here. I think there had to be, in addition, some negative perception of me or, more likely, of "the plaintiff," that seemed plausible enough to justify, in the minds of the various judges involved, the extraordinary step of depriving me of my right. I have no answers to questions such as: What is that erroneous negative perception? What can judges have thought would motivate someone to bring an action and then write what I have written in response to my lawyer's moving to withdraw -- asking for a forum where my lawyer could speak freely and for the court's guidance on how to handle the matter? My continuing fear is that some misperception still persists -- that you will read it into the papers of this petition. I ask you then, if you find yourselves "explaining" the facts of this case in a manner that is not congruent with my account, please subject that "explanation" to close scrutiny: Is there evidence to support it? Have I had a chance to comment on that "evidence"?

II. WARNER LAMBERT ABDICATED THEIR OWN DEFENSE

In their Statement of The Case (5), Warner Lambert include J. Burns' words of March 1985 regarding a finding of prejudice by delay, from which J. Burns retreated in her ruling of May 1985. Such a finding would be in error.

Warner Lambert's false claim that we had failed to honor a commitment to produce more documents is a smokescreen that hides their abdicating preparing a defense. They had, in fact, set up a situation by which they impeded preparing their own defense.

Consider their posture on discovery, outlined in a letter of November, 1978. Without obtaining our commitment to further production (our position was on file), they state their intention to postpone deposing me until we produced more documents. Their letter makes clear we hadn't promised more documents (Eginton to Cochran, November 1978, A 121). Later, when Mr. Cochran twice got in touch with defense counsel (A 129-30) to inquire when they

wished to take my deposition, Warner Lambert declined and once again interposed the question of informal production by plaintiff.*

Once defendant knows the charge, it must assume responsibility for its defense. If it fails to use means the rules provide, that is defendant's own decision and its failure, which cannot fairly be laid at plaintiff's door. It was one thing for Warner Lambert to hope to obtain more documents informally. It

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* Moreover, the sincerity of their claim to need more documents is called in question by:

a) Failing to complain that we were remiss regarding production of documents -- in particular when, instead of responding to a briefing schedule, they demanded that the magistrate dismiss my action under (local) Rule 16 (A 132);

b) Never raising the possibility that they would move to compel documentary production and, when J. Burns indicated she would entertain motions to compel and a motion to dismiss (A 148), choosing to move to dismiss;

c) Stating (A 139) that, should the motion to dismiss fail, they would proceed with the two-stage discovery procedure (i.e., deposing me followed by responding to my interrogatories), which is "the discovery procedure agreed to in 1978" as plaintiff has understood it (A 131).

was a different matter when, without obtaining our commitment to produce more documents, they made deposing me contingent on their obtaining documents informally, to whose production we had objected. Still, they had options:

1. On their own initiative, move to compel production, if needed for their defense;

2. Proceed with my deposition without more production. [Perhaps because they had most of the disputed documents in their possession, this is the option Warner Lambert eventually stated they would choose if the court denied the motion to dismiss (A 139)].

3. Continue to do nothing, thus failing to take my deposition and, since the lawyers had agreed that Warner Lambert could depose me before we would again seek answers to our interrogatories, tieing our hands in moving to compel. [The option Warner Lambert chose.]

When the court invited motions to compel and a motion to dismiss (Pet F 8), Warner Lambert then chose to risk all on a groundless

motion to dismiss, cleverly constructed to make it appear that we had failed to honor commitments -- a claim that is false and mischievous, given that the rules permitted us to have the matter adjudicated by the court, but effective, nonetheless, in deflecting attention from the choices they had made. Others are better equipped than am I to assess the extent to which the techniques Warner Lambert used in fabricating a plausible-appearing motion to dismiss reveal its awareness that the motion was truly groundless.

Where Warner Lambert abdicated preparing their defense, took no initiative in alerting the court to the passing of time, asked for dismissal only when some action was required of them, and failed to use a tool they could readily command, a finding of prejudice by delay is in error (Finley).

III. PROCEDURAL OBJECTIONS FAIL HERE

In appellee's reply brief, Warner Lambert raised even more procedural objections than

they raise in their brief in opposition to my petition for certiorari. In appellant's reply, I responded in detail to all of those objections, as I shall summarise here. Although Warner Lambert state each objection in the most absolute terms, in reading the cases, I invariably found that considerations of finality, includability, and the others, are to be assessed in the context of an overriding policy favoring hearing cases on the merits. Guided by principles relevant to the exercise of discretion in regard to 60(b) motions, I examined, in turn, whether impediments to granting relief from judgment arise from competing values: 1) Orderly Procedure, 2) Finality of Judgment, and 3) Equity for Defendant, or from 4) Lack of substance in my underlying claim.

1. Orderly Procedures may be considered from two perspectives: a) The extent to which earlier proceedings show such an investment in good practice as to make reversing their outcome unthinkable, and b) The extent to which

proceedings on my 60(b) motion are flawed.
a) Through the case's history, orderly process has been violated to a degree that deprives the earlier proceedings of validity. In contrast to what occurred here, your ruling in Conley requires a court, when taking away my right was at issue, to apply the criterion: Can it say beyond doubt that no set of circumstances exists under which my right to a hearing on the merits should be preserved/restored? In place of courts disposed to hold Warner Lambert, as the accuser in a motion to dismiss, to strict standards of probity and consistency, I found: Courts departing from the objective record to accept conclusions prejudicial to me, and failing to cognize in that record my difficulty and my pleas for help; A district court that failed to reveal crucial considerations that led to its granting the motion to dismiss, thus preventing me from arguing effectively for the restoration of my case; An appellate court that failed to

note that I stated I lacked information on the reasons why my case was dismissed. The facts that: i) I am untrained in law and ii) in my 1983 appeal (A 271-4) and in moving for relief from judgment (A 172, 181-4, Aplt Brief, 21-3, 36, 39) had stated that I did not understand why my case was dismissed should have underlined sensitivity to due process here.

Accordingly, Warner Lambert's attack is readily disposed of: Because my arguments were not includable before, no obstacle arises from challenging the underlying judgment or prior affirmance by the appeals court (Aplt Reply 39 -42). As you said in Klapprott, "[A] liberal construction should be given the rule [60(b)] to the end that judgments which are void or vehicles of injustice not be left standing." b) Warner Lambert also fail in attacking the 60(b) proceedings on grounds of timeliness and loss of jurisdiction (Aplt Reply 42-4).

2. Considering finality of judgment, their claim that I am relitigating settled issues

fails. The courts have passed on smokescreen issues that Warner Lambert fabricated. Actual issues remain to be adjudicated (Aplt Rp 44-7)

3. Considering equities between defendant and plaintiff, the legal system provided options, disdained by defendant, but turned a deaf ear when I, finding no appropriate options, appealed for its help (Aplt Reply 47-8).

4. Finally, as described elsewhere (A 289), objective indicators of the merits of my claim exist (Aplt Reply 47).

Because there is nothing at all in the balance to weigh against granting a hearing to my meritorious claim, the district court's denial of relief from judgment was a clear abuse of discretion.

IV. OVERLOOKED ARGUMENTS

Perhaps because I mislabeled my motions, the recent appellate Detailed Order overlooks some of my arguments. It did not include the customary statement that all my remaining ar-

guments lack merit. But it failed, for example, to note that a main ground for my 60(b) motion was my lack of understanding why my case had been dismissed (Aplt Reply, 39 et seq.), and that J. Burns had rebuffed, with an erroneous finding (A 193), my request for her guidance on filing a 60b(6) motion.

Among other possibilities, perhaps my 60b(1) motion should have been grounded in surprise as well as judicial error or stated as a 60b(6) motion based on the fact that I did not understand why my case was dismissed, or perhaps my motions for reconsideration and evidentiary hearing should have been stated as a 60b(6) motion based on judicial error, first revealed in the ruling of March 1985.

It would be an error to ignore arguments because I mislabeled motions:

a) The commentators agree in emphasizing that parties are not bound by the labels they put on their papers and that what counts is the substance of what is said (e.g., 11 Wright &

Miller §2873, 244; 7 Moore 60.18(8) 138).

b) Appellate courts take the initiative in assigning procedural labels, e.g., noting that neither party had mentioned a certain procedural point, an appellate court chose to regard a notice of appeal as a motion, (Weiss).

c) Moreover, this court (Haines) requires that pro se papers be construed liberally.

CONCLUSION

The present failure of due process is remarkable. The courts at all levels should have been disposed in my favor at least to the extent of assuming that I wanted to prosecute, unless defendant could establish otherwise in the objective record. That objective record shows no failure to prosecute and it shows, in the face of difficulties caused by the legal system itself, that I have never ceased to try to prosecute my case. I ask you then to grant my petition and, in rectifying the breakdown that occurred here, help prevent a recurrence.

GERALDINE FENNELL, pro se,
June 26, 1986